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REFORMATION OF WILLS ON THE GROUND OF MISTAKE: CHANGE OF DIRECTION IN AMERICAN LAW?

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Although it has been “axiomatic”¹ that our courts do not entertain suits to reform wills on the ground of mistake, appellate courts in California, New Jersey, and New York have decided cases within the last five years that may presage the abandonment of the ancient “no-reformation” rule. The new cases do not purport to make this fundamental doctrinal change, although the California Court of Appeal in *Estate of Taff*² and the New Jersey Supreme Court in *Engle v. Siegel*³ did expressly disclaim a related rule, sometimes called the “plain meaning” rule. That rule, which hereafter we will call the “no-extrinsic-evidence rule,” prescribes that courts not receive evidence about the testator’s intent “apart from, in addition to, or in opposition to the legal effect of the language which is used by him in the will itself.”⁴ The two courts said that

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¹ 4 G. PALMER, *THE LAW OF RESTITUTION* § 20.1, at 158 (1978). For recent authority, see, e.g., *Brinker v. Wobaco Trust Ltd.*, 610 S.W.2d 160, 165 (Tex. Civ. App. 1980).

² 63 Cal. App. 3d 319, 133 Cal. Rptr. 737 (1976).

³ 74 N.J. 287, 377 A.2d 892 (1977).

⁴ W. BOWE & D. PARKER, *PAGE ON THE LAW OF WILLS* § 32.9, at 270 (Rev. ed. 1961) [hereinafter cited as *PAGE ON WILLS*].

they were consulting extrinsic evidence (primarily the testimony of the lawyers whose poor draftsmanship had led to the litigation) in order to engage in construction of supposedly ambiguous instruments. In truth, each of the two wills was utterly unambiguous. What each court actually did was to prefer the extrinsic evidence of the testator's intent over the contrary but mistaken language in the will.

In the third and most recent of the cases, *In re Snide*,⁵ the New York Court of Appeals had to face one of the recurrent mistake situations: Husband and wife each signed a will prepared for the other, and only after the death of the husband was it discovered that he signed the wrong will. The court expressly reformed the will but treated the situation as a mere exception too narrow to call the underlying no-reformation rule into question.

The inclination of modern courts to prevent injustice despite a long tradition of refusing to remedy mistakes in wills is, in our view, laudable. We do not, however, believe that courts should continue to reach such results by doctrinal sleight-of-hand. Rather, we take the position in the present Article that the time has come for forthright judicial reconsideration of the no-reformation rule. We believe that a reformation doctrine shaped and limited according to criteria that we identify has the capacity to prevent much of the hardship associated with the former rule, while effectively dealing with the concerns that motivated the rule.⁶

In part I of this Article we contrast the no-reformation rule for wills with the opposite practice in other branches of the law of gratuitous transfers. We show that the dangers that are customarily said to justify the no-extrinsic-evidence rule for testation are common to nonprobate transfers as well; there, however, courts admit the evidence but test it against a higher-than-ordinary standard of proof. In part II we direct attention to the principal factor that we believe has motivated the no-reformation rule: the concern that giving effect to the testator's actual but defectively expressed intention would violate the requirement that testamentary language must be transcribed and attested in compliance with the applicable Wills Act.⁷ We review the traditional law of wills at some length in

⁵ 52 N.Y.2d 193, 418 N.E.2d 656, 437 N.Y.S.2d 63 (1981).

⁶ See *infra* text accompanying note 171.

⁷ The various American statutes derive from the Statute of Frauds, 29 Car. 2, c. 3, § 5 (1676), requiring devises of land to be made in writing, signed by the testator, and witnessed; and from the superseding Statute of Victoria, 7 Wm. 4 & 1 Vic. c. 26 (1837), which imposed uniform requirements for estates of personalty

order to show how often the courts now admit and act upon extrinsic evidence of the testator's intent when the type of mistake is one that can be remedied without supplying new and hence unattested language.

In part III we discuss the three recent decisions from California, New Jersey, and New York. The California and New Jersey courts in *Taff* and *Engle v. Siegel* expressly overcame the inhibitions of traditional law against the receipt of extrinsic evidence in order to take cognizance of the mistakes. Yet for want of a theory capable of overcoming the concern with achieving compliance with the formal requirements of the Wills Act, the two courts purported to be engaged in mere construction. Our main theme in part III is to show that no defensible limiting principle can be found to distinguish the three recent cases from the many like cases in which courts have refused to remedy mistake.

Having demonstrated that the Wills Act attestation policy has been the decisive factor underlying the no-reformation rule, we argue in part IV that it is misguided. There are major grounds of distinction between a routine case of noncompliance with Wills Act formality and the question involved in reforming a mistake in an instrument that has been executed in conformity with the Act. We point to the analogy of judicial practice in correcting mistaken language in instruments that must satisfy the formal requirements of the Statute of Frauds. We believe that the theory developed to explain those cases should apply with full force to the comparable issue that arises when unattested language is supplied to correct a document that must comply with the Wills Act. We also notice the "remedying-wrongdoing" theory in the law of constructive trusts, where courts have intervened to enforce a testator's true intent when the disposition in the will has been distorted by third-party wrongdoing. We suggest that in the many cases in which the negligence of a lawyer-draftsman (or his typist) is responsible for the

and realty. The later act also prescribed that the signature be at the end of the document, and that the will be attested by two witnesses in the presence of the testator. Some states require additional formalities, *e.g.*, that the witnesses sign in each others' presence, or that the testator declare the instrument to be his last will. See 2 PAGE ON WILLS, *supra* note 4, § 19.2, at 60-61. The majority of states follow the less restrictive Statute of Frauds, and about a quarter have adopted the UNIFORM PROBATE CODE § 2-502 (1977). Section 2-502 requires a "writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction," and the signatures of "at least 2 persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will." Furthermore, over half the American states now allow holographic wills, in which handwriting substitutes for attestation. For discussion of the purposes served by Wills Act formality, see *infra* note 27.

error in the will, the remedying-wrongdoing theory could supply an independent basis for judicial relief against mistake in wills.

In part V we spell out the criteria that are likely to characterize a general doctrine of reformation for mistake, and we review some factors that give cause for optimism that the doctrine will work smoothly and without undesirable side effects. We also discuss the possibility of treating lawyers' malpractice liability as an alternative to the reformation doctrine. We maintain that while more frequent invocation of the malpractice liability of incompetent lawyers is warranted and likely to occur, that development cannot suffice in lieu of a well-designed reformation rule. We conclude that a reformation doctrine would often constitute less an innovation in principle than in candor. It would clarify, generalize, and extend in logical fashion the principles that underlie existing practices that relieve against mistake in wills.

I. THE CONTRAST WITH NONPROBATE TRANSFERS: THE EVIDENTIARY POLICY

The no-reformation rule is peculiar to the law of wills. It does not apply to other modes of gratuitous transfer—the so-called nonprobate transfers—even though many are virtually indistinguishable from the will in function. Reformation lies routinely to correct mistakes, both of expression and of omission, in deeds of gift, inter vivos trusts, life insurance contracts, and other instruments that serve to transfer wealth to donees upon the transferor's death.⁸ Alternatively, courts sometimes find it necessary to remedy mistakes in these nonprobate transfers by imposing a constructive trust on the mistakenly named beneficiary in favor of the intended beneficiary.⁹

Courts have been willing to use their equity powers in these nonprobate situations, because a case of well-proven mistake necessarily invokes the fundamental principle of the law of restitution: preventing unjust enrichment. If the mistake is not corrected, the mistaken beneficiary is unjustly enriched at the expense of the intended beneficiary. Moreover, when the mistake results from the wrong of a third party, the courts sometimes speak of a second policy: protecting an innocent party (here, the intended beneficiary) from suffering the consequences of another's wrongdoing.¹⁰

⁸ See *infra* cases cited in notes 13-16. See generally 4 G. PALMER, *supra* note 1, §§ 18.2, 18.4-5, 18.7, at 7-10, 16-26, 30-44.

⁹ 4 G. PALMER, *supra* note 1, § 18.9, at 71 n.4.

¹⁰ See *infra* text accompanying notes 191-93.

Judicial intervention to prevent unjust enrichment or to protect the victim of wrongdoing has such a manifestly compelling doctrinal basis that the puzzle is to explain why the courts have not been willing to act similarly when the document affected by the mistake is a will. Unjust enrichment (or third-party negligence) is equally wrong whether the resulting error occurs in an inter vivos transfer or in a will. Both transfers are gratuitous, both unilateral. Accordingly, we emphasize as a starting point that the no-reformation rule for wills cannot rest on the notion that there is no wrong to remedy. Why, then, does equity refuse to remedy unjust enrichment in the case of a mistaken will?

The customary justification has to do with the nature of the evidence in cases of testation. A will is by definition "ambulatory," meaning ineffective to pass property until the death of the testator. Evidence suggesting that the document is affected by mistake—that the will is at variance with the testator's actual intent—must necessarily be presented when death has placed the testator beyond reply. The testimony will typically involve statements allegedly made by the testator, so-called direct declarations of intent, which he can now neither corroborate nor deny. The testator's main protection against fabricated or mistaken evidence is the will itself. Therefore, it is argued, evidence extrinsic to the will should be excluded. And if extrinsic evidence is excluded, the court can have no grounds to reform.

There are, we think, two persuasive answers. First, although the living donor under an inter vivos instrument can take the stand and testify about his true intent, this testimony does not have automatic reliability. The donor's testimony doubtless reflects his current intent, but the matter in issue is his intent at the time the instrument was executed. The instrument may have stated this intent accurately; he may since have changed his mind and now be lying or deceiving himself, or he may be mistaken about what he originally intended. Consequently, even the donor's own testimony is properly regarded as inherently suspect, which is why even such testimony is put to the clear-and-convincing-evidence test.¹¹

Second, and still more telling, reformation of documents effecting gratuitous inter vivos transfers is routinely granted even after

¹¹ See, e.g., *In re Trust Estate of LaRocca*, 411 Pa. 633, 192 A.2d 409 (1963) (reformation denied because the donor's testimony was contradictory and evasive). Cf. RESTATEMENT (SECOND) OF TRUSTS § 332 comments c & e (1959) (taking a harsh position that in no circumstances may the settlor's uncorroborated testimony be accepted as sufficient. This position is criticized in 4 G. PALMER, *supra* note 1, § 18.7, at 34-37).

the death of the donor.¹² In these cases the extrinsic evidence is inherently suspect for exactly the reason that evidence of a testator's intent is suspect when offered against a will. Nevertheless, in non-probate transfers when the clear-and-convincing-evidence standard has been satisfied, clauses omitted by mistake have been inserted;¹³ mistaken designations of the beneficiaries,¹⁴ of the property intended to have been the subject matter of the gift,¹⁵ and of the extent of the interest intended to have been granted to the beneficiary¹⁶ have been corrected. Documents drafted by lawyers (or others) have not been distinguished from self-drawn documents;¹⁷ enrichment of an unintended donee at the expense of the intended donee is unjust whether the mistake has been made by the donor or by his lawyer. The essential safeguard in these cases has been the clear-and-convincing-evidence standard, which appellate courts have policed rigorously.¹⁸

¹² See 4 G. PALMER, *supra* note 1, § 18.9(a), at 70-80. A dissenting view was adopted in one case, *Union Trust Co. v. Boardman*, 215 A.D. 73, 78-80, 213 N.Y.S. 277, 283-85 (1925), *aff'd mem.*, 246 N.Y. 627, 159 N.E. 678 (1927), where the supreme court held that since wills could not be reformed and since wills are indistinguishable from inter vivos trusts once the settlor has died, inter vivos trusts are not reformatable after the settlor's death. In a later New York case, however, another supreme court, acting in apparent ignorance of the *Union Trust* decision, ordered that a deed be reformed after the grantor's death. *Simms v. Simms*, 139 Misc. 726, 249 N.Y.S. 171 (Sup. Ct. 1931). The *Union Trust* decision is criticized in 4 G. PALMER, *supra* note 1, § 18.9(a), at 75-77.

An unwarranted restriction on the after-death reformability of inter vivos transfers is stated in RESTATEMENT OF RESTITUTION § 127 (1937): The intended donee must be a "natural object of the donor's bounty" to be entitled to reformation in his favor. See also *id.* § 165 comment c. According to 4 G. PALMER, *supra* note 1, § 18.9, at 77-80, where the restriction is persuasively criticized, there was no authority for it when it was enunciated, and it has attracted subsequent support in only one case, *Sweeney v. Peterson*, 106 Colo. 287, 103 P.2d 1064 (1940).

¹³ *E.g.*, *Berman v. Sandler*, 80 Mass. Adv. Sh. 113, 399 N.E.2d 17 (1980) (the words "the first paragraph of," mistakenly omitted from a document amending an inter vivos trust, ordered inserted); see also *Brinker v. Wobaco Trust Ltd.*, 610 S.W.2d 160 (Tex. Civ. App. 1980).

¹⁴ *E.g.*, *Bosse v. Bosse*, 248 Ky. 11, 57 S.W.2d 995 (1933) (beneficiary of life insurance policy changed from insured's sons to insured's wife); *Mattingly v. Speak*, 57 Ky. (4 Bush) 316 (1867) (grantee in deed changed from grantor's son-in-law to grantor's daughter); *Merriam v. Nat'l Life & Accident Ins. Co.*, 169 Tenn. 291, 86 S.W.2d 566 (1935) (beneficiary of life insurance policy changed from insured's estate to insured's friend); see *Griffin v. Stewart*, 101 Ga. 720, 29 S.E. 29 (1897) ("heirs of the body" sought to be changed to "children").

¹⁵ See, *e.g.*, *Stover v. Hill*, 208 Ala. 575, 94 So. 826 (1922); *Reinberg v. Heiby*, 404 Ill. 247, 88 N.E.2d 848 (1949).

¹⁶ *E.g.*, *Swinebroad v. Wood*, 123 Ky. 663, 97 S.W. 25 (1906) (deed to daughter and her children as tenants in common reformed to grant life estate to daughter, remainder to her children); see *Wyche v. Greene*, 16 Ga. 49 (1854).

¹⁷ *Wyche v. Greene*, 16 Ga. 49, 61 (1854).

¹⁸ See *In re Estate of Duncan*, 426 Pa. 283, 232 A.2d 717 (1967) (decree of Orphans' Court handed down after settlor's death directing reformation of instrument

Accordingly, we think that there is no principled way to reconcile the exclusion of extrinsic evidence in the law of wills with the rule of admissibility in the law of nonprobate transfers. Not surprisingly, the no-extrinsic-evidence rule has long been embattled even in the traditional law of wills;¹⁹ it has been subjected to a variety of exceptions, some of which we discuss below in part II; and it is now on the decline. Wigmore's immensely influential critique²⁰ of the no-extrinsic-evidence rule underlies its abrogation in California and New Jersey.²¹ Wigmore argued that any effort to limit the proofs to the words of a document runs afoul of the "truth . . . that words *always* need interpretation" ²² Wigmore coined the famous phrase that "the 'plain meaning' . . . is simply the meaning of the people who did *not* write the document." ²³

The Continental legal tradition has for centuries been opposed to our no-extrinsic-evidence rule. The testator's subjective intent predominates over literal meaning; extrinsic evidence is freely admissible, and techniques of supplementary interpretation (*ergänzende Auslegung*) allow courts to fashion remedies on the imputed intent principle (what would the testator have desired had he known?).²⁴ The treatises give no indication that the reception of extrinsic evidence has been anything of a trouble spot. Quite the contrary suggestion was made in evidence to the English Law Reform Committee by the late Professor E.J. Cohn, an experienced practitioner in both England and Germany: "It is my impression that there are rather more disputes on the meaning of wills in this country than in the civilian countries. This may partly be

amending inter vivos trust, held reversed because evidence of mistake was not clear and convincing); *In re Estate of LaRocca*, 411 Pa. 633, 192 A.2d 409 (1963) (decree of Orphans' Court handed down during settlor's lifetime directing reformation of inter vivos trust, held reversed because evidence of mistake was not clear and convincing).

¹⁹ See, e.g., Thayer's critique of the distinction between latent ambiguities, regarding which extrinsic evidence is admissible, and patent ambiguities, where it is not, in J.B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 423-25, 471-73 (1898).

²⁰ 9 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §§ 2461-62, 2470, at 187-96, 224-28 (3d ed. 1940).

²¹ *Estate of Russell*, 69 Cal. 2d 200, 209-11, 444 P.2d 353, 359-60, 70 Cal. Rptr. 561, 567-68 (1968), discussed *infra* text following note 132; *Wilson v. Flowers*, 58 N.J. 250, 260-62, 277 A.2d 199, 205-06 (1971).

²² 9 J. WIGMORE, *supra* note 20, § 2470, at 227 (emphasis in original).

²³ *Id.* § 2462, at 191 (emphasis in original).

²⁴ T. KIPP & H. COING, *ERBRECHT* 137-51, 161-74 (13th ed. 1978).

due to the fact that complex rules like [those attempting to exclude extrinsic evidence] invite lawsuits." ²⁵

We believe that the evidentiary problem, although important, does not in fact explain or justify the no-reformation rule in matters of testamentary mistake. If the courts had not been deeply worried about another policy, namely, compliance with Wills Act formality, we think that they would long ago have followed the evidentiary practice in nonprobate transfers for dealing with claims of mistake. Instead of excluding the evidence, and thereby foreclosing any chance of proving the mistake, the courts would have dealt with the potential unreliability of the evidence by admitting it and testing it against the higher-than-ordinary standard of proof that has worked so well in the law of nonprobate transfers.

II. UNDERSTANDING THE NO-REFORMATION RULE: THE UNATTESTED LANGUAGE PROBLEM

The great obstacle to reformation in the law of wills has been remedial rather than evidentiary. The real problem has not been proving the mistake with adequate certainty, but remedying it in a fashion consistent with the requirements of Wills Act formality.²⁶ When the particular mistake that has affected a will is one that would require a court to supply an omitted term or to substitute language outside the will in place of a mistaken term, the objection arises that the language to be supplied was not written, signed, and attested as required by the Wills Act. In these cases reformation would appear to have the courts interpolating unattested language into the will.

In this part we review the traditional law of testamentary mistake. We shall emphasize that there is a persistent pattern in the law that helps us to see that the courts are less serious about the evidentiary problem than about the problem of technical Wills Act compliance. When a court can correct a mistake by means of a theory—usually a theory of supposed construction—that does not appear to conflict with the Wills Act, the court admits the extrinsic evidence needed to prove the mistake. When, however, the situation is one in which it appears that remedy cannot be given without

²⁵ E.J. Cohn, Law Reform Comm., Sub-comm. on the Interpretation of Wills: Comments on the Working Paper for Consultation 5 (unpublished statement to the Law Reform Committee, October 8, 1969) (copy on file with the University of Pennsylvania Law Review). The report of the committee is discussed *infra* text accompanying note 185.

²⁶ See *supra* note 7 for description of the Wills Act formal requirements.

violating the formal requirements of the Wills Act, the courts generally deny relief by invoking the no-extrinsic-evidence rule. The courts purport to fear the potential unreliability of extrinsic evidence when they exclude it, yet they admit extrinsic evidence in contexts in which it is equally unreliable. We shall see that, depending upon the circumstances, the courts have been able to manipulate notions of construction in these cases in two ways: primarily by refusing effect to mistaken but attested language; but occasionally by conferring the imprimatur of attestation upon unattested language, that is, language not contained in the will.

It is essential to understand that the unattested language problem raises a technical or formal rather than a purposive question. The purpose of having all the terms of a will attested is evidentiary,²⁷ and the courts have shown themselves able to deal effectively with the concern about the quality of the proofs in mistake cases. Accordingly, we believe that the primary impediment to the adoption of a general reformation doctrine for wills has been the seeming need for technical adherence to the Wills Act, rather than any judgment that it would offend the underlying purpose of the Wills Act to remedy well-proven mistakes. And that in turn throws light on why the no-reformation rule has produced results so harsh. In countless cases of palpable mistake, the courts have felt obliged to enforce the Wills Act literally even though it is manifest that to do so defeats the basic goal of the Wills Act, which is to implement the testator's intent.

A. Ambiguity

Situations involving ambiguous expression give rise to a significant fraction of the mistakes that occur in wills, and even under

²⁷ The literature attributes to the Wills Act formalities three functions beyond the evidentiary. By requiring the testator to put his wishes in writing, to sign the document, and to have it attested, the Wills Act serves a cautionary or ritual function, warning the testator of the seriousness and finality of the instrument. Second, these formalities serve a protective function, by making it difficult for crooks to deceive or coerce the testator. And third, the formalities serve a channeling function, routinizing testation and facilitating relatively inexpensive processing of wills in post-mortem proceedings. For a recent discussion of these policies with references to earlier literature, see Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491-98 (1975).

When a testator executes a will that is afflicted by a mistakenly rendered or mistakenly omitted term, only the evidentiary function of the Wills Act is seriously in question. Because the rest of the will was properly written, signed, and witnessed, the testator was cautioned and protected and the probate channel was marked and elected. The question in a mistake case is whether an instrument that otherwise satisfies the letter and spirit of the Wills Act fails in one particular to

traditional law mistakes of this type are remediable in will construction suits. Ironically, therefore, the availability of remedy for this kind of mistake has played a role in keeping the no-reformation rule in force, by reducing the pressure to reexamine it.

The ambiguity doctrine has two basic elements: (1) where the will contains an ambiguity,²⁸ extrinsic evidence is admissible to clarify it; and (2) if necessary, mistaken parts of a will may be disregarded in order to give effect to intention proved by extrinsic evidence. The leading American decision enunciating these principles (though by no means the innovator²⁹) is *Patch v. White*,³⁰ decided by a sharply divided United States Supreme Court in 1886. The testator's will devised to his brother a parcel of land described as "lot numbered six, in square four hundred and three, together with the improvements thereon erected and appurtenances thereto belonging—being a lot which belongs to me, and not specifically devised to any other person in this my will."³¹ Extrinsic evidence revealed a latent ambiguity: There was a conflict between the description contained in the will and the subject matter of the gift. Although there was a square 403, and it contained a lot number 6, the testator did not (and never did) own that lot and there were no improvements on it. The Court then repeated a maxim that still appears in the decisions. "It is settled doctrine," the Court said, "that as a latent ambiguity is only disclosed by extrinsic evi-

evidence the testator's intended disposition. (We recur *infra* text accompanying notes 173-87 to the significance of the distinction between partial and total non-compliance with the Wills Act.)

²⁸ Our discussion in text treats latent ambiguities, which historically have been distinguished from patent ambiguities. Patent ambiguities arise from the words of the will, e.g., when provisions conflict with one another. Latent ambiguities arise in applying words of the will to external circumstances. Bacon argued that extrinsic evidence could not be used to clarify patent ambiguities: Patent ambiguity, he said, "is never holpen by averment . . . because the law will not couple and mingle matter of speciality, which is of the higher account, with matter of averment, which is of inferiour account." F. BACON, *ELEMENTS OF THE COMMON LAWES OF ENGLAND* 82 (London 1639). Thayer described Bacon's distinction as an "unprofitable subtlety," J.B. THAYER, *supra* note 19, at 424, and Wigmore also condemned it, 9 J. WIGMORE, *supra* note 20, at 226, 239. The distinction probably has little force today. To the extent that it is recognized, it probably keeps out evidence of the testator's direct declarations of intent rather than all extrinsic evidence. *E.g.*, *Breckner v. Prestwood*, 600 S.W.2d 52, 56 (Mo. Ct. App. 1980). Many courts, however, allow the testator's direct declarations of intent to be introduced with other extrinsic evidence to clarify patent ambiguities. *E.g.*, *In re Estate of Smith*, 119 Ariz. 293, 580 P.2d 754 (1978).

²⁹ An example of an earlier decision is *Hearn v. Ross*, 4 Del. (4 Harr.) 46 (1843).

³⁰ 117 U.S. 210 (1886) (5-to-4 decision).

³¹ *Id.* 214.

dence, it may be removed by extrinsic evidence.”³² The extrinsic evidence showed that the testator did own lot number 3, in square 406, and that this lot had not been specifically devised and was improved with a dwelling house. The Court found that the testator intended to devise this lot 3 to his brother. And his intent could be given effect by “striking out the false description.”³³ In effect, the Court treated the testator’s will as though it devised “lot number [blank], in square four hundred and [blank]”³⁴ The Court then found that other evidence sufficed to establish the correct lot and square numbers: Lot 3 in square 406 was the only one the testator owned in a square whose number commenced with four hundred and that was not otherwise specifically disposed of in his will. The Court analogized this process of construction to the construction of words “blurred by accident so as to be illegible”; cases in which words have been judicially stricken or disregarded because of mistake, the Court concluded, should be resolved in the same way.³⁵

The process employed in *Patch v. White* has been routinely applied to descriptions of devisees as well as property. In a recent case, for example, the testatrix bequeathed her residuary estate in equal shares to “my beloved nephew Raymond Schneikert and Mabel Schneikert his wife, of Plymouth, Wisconsin.”³⁶ Extrinsic evidence revealed a latent ambiguity: When the will was executed, Raymond was married to Evelyn, not to Mabel. Mabel was Raymond’s former wife; she had remarried and was then living in Sheboygan, Wisconsin, with her new husband. The court said that since this ambiguity was “disclosed by extrinsic evidence it may be removed by such evidence.”³⁷ The extrinsic evidence, including testimony of the attorney who drew the will in the hospital nine days before the testatrix’s death, showed that the intended legatee was Raymond’s current wife, Evelyn, but that the testatrix got confused and gave the name “Mabel” when asked for Raymond’s wife’s name. Applying the standard rule of construction, the court said, “it is possible to strike the words ‘Mabel Schneikert’ from the residuary bequest and have left a bequest to ‘Raymond

³² *Id.* 217.

³³ *Id.* 220.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Breckheimer v. Kraft*, 133 Ill. App. 2d 410, 411-12, 273 N.E.2d 468, 469 (1971).

³⁷ *Id.* at 412, 273 N.E.2d at 469.

Schickert [sic] and his wife, of Plymouth, Wisconsin.' " ³⁸ As thus altered the bequest favored Evelyn, not Mabel.

At present, therefore, if an ambiguity is found to exist, courts are prepared to admit just that sort of extrinsic evidence of the testator's intent (including his direct declarations) that would have to be admitted if a general reformation doctrine for wills were to be adopted. Why is it that the admissibility of such evidence is conditioned on the appearance of a so-called ambiguity? One conceivable justification is that the concept of ambiguity may seem to define a relatively objective category that invites particularly reliable evidence. In misdescriptions such as the real estate in *Patch v. White* or the devise to the former Mrs. Schneikert, there was a virtual certainty that the testator's will did not state his intent accurately. In other cases, however, the resolution of what has been treated as an ambiguity requires a much more subjective determination. In these cases the courts resort to extrinsic evidence of the testator's intent that is as suspicious as the evidence in the routine mistake cases to which the no-reformation rule applies. For example, in a devise to "my well-beloved nephews John and William," the contestants were allowed to treat the description "well-beloved" as ambiguous and to prove that the testator did not so regard John and William.³⁹ Another contestant attacked as ambiguous a devise to "my friend Richard H. Simpson," in order to establish that the name "Richard H." was a misdescription because he was not the testator's "friend."⁴⁰

We infer that it is not the quality of the evidence, but the availability of a theory of remedy, that explains the courts' willingness to correct mistakes that can be characterized as resulting in ambiguity. The great attraction of the ambiguity label is that it virtu-

³⁸ *Id.* at 414, 273 N.E.2d at 471. "A mistake in description may be corrected by rejecting that which is shown to be false, but no words may be inserted in place of those stricken and no word or words may be supplied." *Id.* at 414-15, 273 N.E.2d at 471; see *Norton v. Jordan*, 360 Ill. 419, 196 N.E. 475 (1935).

³⁹ *Willard v. Darrah*, 168 Mo. 660, 68 S.W. 1023 (1902). John and William were in fact grandnephews of the testator. The contestants, also John and William, were the testator's grandsons. The court remarked that the extrinsic evidence showed "beyond a reasonable doubt, that the testator intended . . . to devise the land . . . to his well-known and well-beloved grandchildren, the plaintiff John Willard and his brother William Willard, and not to his two grandnephews of the same names, who were not personally known to, or well-beloved of him," and held that the trial court erred in rejecting this evidence. *Id.* at 666, 68 S.W. at 1024.

⁴⁰ *Siegley v. Simpson*, 73 Wash. 69, 131 P. 479 (1913); cf. *Powell v. Biddle*, 2 Dall. 70 (Pa. 1790) (legacy to "friend Samuel Powell" interpreted in favor of testator's grandson William Powell over Samuel, who did not know testator, based in part on evidence of testator's habitually referring to William as "Samuel").

ally assures that the courts can effect a remedy within the confines of the Wills Act. Ambiguity invokes the theory of construction rather than of reformation. When a court "construes" attested language, it "discovers" what the "ambiguous" words of the will "really" mean, whereas when a court reforms an instrument, it forthrightly supplies language from without. Although in truth the court in *Patch v. White* supplied omitted lot and section numbers, the ambiguity rubric permitted it to say that it was construing words within the will.

Courts are under pressure to find ambiguity where none exists because the concept of ambiguity imports a concept of remedy that is permissible under traditional thinking about what the Wills Act requires. As we shall notice in part III, the recent California and New Jersey cases, *Taff* and *Engle v. Siegel*, instance this phenomenon in especially egregious and transparent form.⁴¹

Occasionally, a court neglects to employ the construction rubric in one of these misdescription cases, accidentally revealing that the process sometimes amounts to reformation in all but name. For example, in the recent *In re Will of Goldstein* case⁴² involving a misdescription of real estate much like *Patch v. White*, the court purported to follow *Patch v. White* but said that "the court, to effectuate the [testator's] intention, may change or mold the language."⁴³

⁴¹ See *infra* text accompanying notes 124-50.

⁴² 46 A.D.2d 449, 363 N.Y.S.2d 147 (1975), *aff'd mem.*, 38 N.Y.2d 876, 346 N.E.2d 544, 382 N.Y.S.2d 743 (1976).

⁴³ *Id.* at 452, 363 N.Y.S.2d at 151 (quoting *In re Birdsell's Will*, 271 A.D. 90, 94, 63 N.Y.S.2d 146, 150 (1946), *aff'd*, 296 N.Y. 840, 72 N.E.2d 26 (1947), where "or" was changed to "and" because "if the language of the propounded instrument discloses a general scheme or dominant purpose the words used may be modified or adjusted to give effect thereto.").

The testator in *Goldstein* devised to two long-time employees "the real property owned by me on the west side of Third Street in the City of Niagara Falls." 46 A.D.2d at 450, 363 N.Y.S.2d at 149. However, he "did not own any real property on Third Street, although he resided in an apartment that he did not own on the west side of Third Street. The only real property of any substance owned by the testator was the property on which the business was operated and that property was on the east side of Sixth Street." *Id.* The court reasoned that "the language lacks clarity and we must look to extrinsic evidence to find the testator's intention in his reference to the Third Street property." *Id.* at 451, 363 N.Y.S.2d at 149. Since "[t]he testator owned no real property on Third Street," the will contained a latent ambiguity that required the court to consult extrinsic evidence in order not "to permit a misdescription to frustrate the testator's intention." *Id.* at 451, 363 N.Y.S.2d at 149-50.

If the testator had devised the Niagara Falls waterfalls to his two employees, they would have taken nothing because he did not own the property. The same should have been true of the Third Street property that he did not own. In order

In a still more striking case, *In re Estate of Gibbs*,⁴⁴ the court substituted a correct term for a mistaken one without pretense of construction. The testator devised a fraction of his estate "to Robert J. Krause, now of 4708 North 46th Street, Milwaukee, Wisconsin."⁴⁵ There was a Robert J. Krause at that address; extrinsic evidence showed that the testator never knew him but did know and intend to benefit one Robert W. Krause, a friend and employee of thirty years who lived in the same part of town. The testator or a helper had used the telephone book and dialed, as it were, a wrong letter.

The Supreme Court of Wisconsin said that the will was unambiguous, yet the court approved the receipt of extrinsic evidence and the award of the share to Robert W. The court's rationale deserves to be probed with care:

[D]etails of identification, particularly such matters as middle initials, street addresses, and the like, which are highly susceptible to mistake, particularly in metropolitan areas, should not be accorded such sanctity as to frustrate an otherwise clearly demonstrable intent. Where such details of identification are involved, courts should receive evidence tending to show that a mistake has been made and should disregard the details when the proof establishes to the highest degree of certainty that a mistake was, in fact, made.⁴⁶

The court's reasoning is wholly persuasive, *except when advanced in support of the point in issue*, which is how to justify treating this case as an exception to the general rule against reformation for mistake. Nothing that the court says distinguishes this case from those covered by the no-reformation doctrine; the main factors that the court mentions apply in many alleged mistake cases. The label "detail" is conclusory and, especially in a case in which the detail is the designation of the beneficiary under a duly executed will, highly inappropriate. The concern not to frustrate the testator's intent is laudable but would be the purpose of relief in every mistake case. The critical element that the court cites to justify its admitted "disregard" of the term in the will is the quality of

to turn the devise of Third Street property into a devise of Sixth Street property, the court necessarily had to decide that the testator intended a devise that he mistakenly omitted from the will.

⁴⁴ 14 Wis. 2d 490, 111 N.W.2d 413 (1961).

⁴⁵ *Id.* at 491, 111 N.W.2d at 415.

⁴⁶ *Id.* at 499, 111 N.W.2d at 418.

the proof of mistake. The opinion does not suggest (and in truth could not have discovered) a limiting principle for thinking that "when the proof establishes to the highest degree of certainty that a mistake was, in fact, made," relief should lie only when the mistake is a "detail," whatever detail means. Proof of such quality regarding any aspect of the will, detail or not, would be equally cogent and should lead to relief for the same reason. If this were a court that took seriously the argument that the Wills Act forbids substituting unattested language for mistaken language, it could not have distinguished this case; an unattested term was proved by means of extrinsic evidence and preferred over the term contained in the testator's duly executed will.

What makes *Gibbs* an easy case is not that the mistake was a detail, but that the mistake was proved by evidence "of the highest degree of certainty." To be sure, Mr. Gibbs might have meant to benefit the stranger, as an eccentric prank on his faithful friend and servant of thirty years; we cannot entirely exclude the possibility that the inference of mistake drawn by the court was erroneous and that this share of the testator's estate was distributed contrary to his intent. What can be said with utter confidence is that because that possibility is highly unlikely in any one case, testators' wishes in the aggregate will much more often be served by remedying well-proven mistakes than not.

B. Personal Usage

The "personal usage" doctrine⁴⁷ permits a court to override attested language in favor of contrary extrinsic evidence even in a case in which the language in the will is manifestly unambiguous. For example, in *Moseley v. Goodman*⁴⁸ the court found that a bequest nominally in favor of "Mrs. Moseley" was in fact intended for Mrs. Trimble. Mrs. Lenoir Moseley, a person who had never met the testator but whose husband had been a long-time acquaintance of his, claimed the bequest. But the court preferred Mrs.

⁴⁷ E.g., *Moseley v. Goodman*, 138 Tenn. 1, 195 S.W. 590 (1917); *In re Estate of Gehl*, 39 Wis. 2d 206, 159 N.W.2d 72 (1968) (word "children" in home-drawn will held to include the testatrix's six step-children on the strength of extrinsic evidence that she "habitually referred to [them] as 'my children'"); see also RESTATEMENT OF PROPERTY § 241 comment a, § 242 comment d (1940); T. ATKINSON, HANDBOOK OF THE LAW OF WILLS §§ 60, 146, at 285-86, 810 (2d ed. 1953); 4 PAGE ON WILLS, *supra* note 4, § 30.21, 32.4, 32.8, 32.10, 33.19, at 143, 243-44, 265, 278-80, 322-24; 9 J. WIGMORE, *supra* note 20, § 2470, at 227 n.11; Henderson, *Mistake and Fraud in Wills—Part I: A Comparative Analysis of Existing Law*, 47 B.U.L. REV. 303, 359-60 (1967).

⁴⁸ 138 Tenn. 1, 195 S.W. 590 (1917).

Trimble over Mrs. Moseley because the evidence was "overwhelming"⁴⁹ that, although Mrs. Trimble was not generally known as "Mrs. Moseley," the testator usually and perhaps always called her by that name. Mrs. Moseley's counsel argued that no matter how convincing the evidence was, it could not be given effect because to do so would require "nothing short of striking the name of Mrs. Moseley from the will, and inserting in its place that of Mrs. Trimble" ⁵⁰ The court rejected the argument, calling it "clearly fallacious."⁵¹ "We look to the evidence," the court said, "merely to ascertain what individual the testator had in mind when he wrote the term 'Mrs. Moseley.' " ⁵²

The extrinsic evidence that the court consults in a personal usage case, usually including testimony about the testator's oral declarations of intent, is hardly more reliable in a setting like *Moseley v. Goodman*⁵³ than in a conventional mistake case in which, since the no-reformation rule would apply, the court would exclude the extrinsic evidence. Consider, for example, the famous case of *Mahoney v. Grainger*,⁵⁴ to which we shall often hereafter refer as our prototype case under the traditional law. The testatrix had one aunt and twenty-odd cousins. She asked her attorney to draw a will in which the cousins would share the residue equally. He drafted it so that she devised the residue "to my heirs at law living at the time of my decease" ⁵⁵ The trial court awarded the entire estate to the aunt, who—being of closer degree under the intestacy scheme—was the sole heir-at-law. The Supreme Judicial Court affirmed. "There is no doubt as to the meaning of the words 'heirs at law living at the time of my decease' as used in the will," said Chief Justice Rugg in a magnificently conclusory pronouncement. "Confessedly they refer alone to the aunt of the testatrix and do not include her cousins." ⁵⁶ Why the aunt when the testatrix

⁴⁹ *Id.* at 7, 195 S.W. at 591. The court at various other places in the opinion described the evidence in the following terms: "ample evidence to sustain the verdict," *id.* at 10-11, 195 S.W. at 592; "weighty preponderance," *id.* at 13, 195 S.W. at 594; "[t]he evidence recited . . . must convince any one, as it did the jury" *Id.* at 19, 195 S.W. at 594.

⁵⁰ *Id.* at 18, 195 S.W. at 594.

⁵¹ *Id.* at 19, 195 S.W. at 594.

⁵² *Id.*

⁵³ See RESTATEMENT OF PROPERTY § 241 comment a (1940), where it is pointed out that triers of fact should be "cautious in giving credence to [such] evidence"

⁵⁴ 283 Mass. 189, 186 N.E. 86 (1933).

⁵⁵ *Id.* at 190, 186 N.E. at 86.

⁵⁶ *Id.* at 191, 186 N.E. at 87 (citations omitted).

meant the cousins? "A will duly executed . . . must under the statute of wills be accepted as the final expression of the intent of the person executing it. The fact that it was not in conformity to the instructions given to the draftsman who prepared it or that he made a mistake does not authorize a court to reform or alter it or remould it by amendments."⁵⁷

Under the personal usage doctrine, if there had been extrinsic evidence that the testatrix in *Mahoney v. Grainger* habitually referred to her first cousins as her "heirs," the evidence would have been admissible and the case could have been decided oppositely. Evidence of habitual usage is, to be sure, a persuasive form of evidence of testator's intent, but so was the evidence of mistaken usage that was excluded in *Mahoney v. Grainger* on account of the no-reformation rule. As in the ambiguity cases, what explains the difference in treatment is not any serious difference in the reliability of the evidence, but rather a difference in the theory of remedy. Personal usage is nominally a doctrine of construction; extrinsic evidence is supposedly brought to bear on the question of the meaning of the duly attested language within the will.⁵⁸ The court purports to construe that language to correspond to the testator's private meaning—by reference to his "private dictionary,"⁵⁹ it is sometimes said. Yet, as the contestant in *Moseley v. Goodman* pointed out, it would be equally reasonable to describe the process as one in which the court strikes out the disputed language and inserts other language, which would be true reformation. The courts' insistence

⁵⁷ *Id.*

⁵⁸ We can cast a little further light on the personal usage doctrine by contrasting it with the doctrine of independent significance, which authorizes the full meaning of a devise to be determined by reference to extrinsic fact if the fact has some lifetime significance apart from its effect on the will. For example, in a devise "to the person who is my housekeeper at my death," the devisee is identified by reference to a fact whose significance is independent of the will; the devise is effective even though the testator's act of hiring the housekeeper was not performed in accordance with Wills Act formality. On the other hand, the Wills Act is viewed as invalidating a devise "to the persons whose identity I shall disclose orally to my executor before my death," even if this devise appeared in a properly executed document. The property would have to pass in accord with an oral declaration that was not executed with Wills Act formality and that lacked independent significance. To give it effect would be to validate an oral will, directly contrary to the statute. The personal usage cases treat testimony of the testator's personal usage of words in a fashion similar to the treatment of the hiring of the housekeeper, under the doctrine of independent significance. It is as if the testator's devise ran "to the persons I normally call my heirs." See 4 PAGE ON WILLS, *supra* note 4, § 32.9, at 274.

⁵⁹ The personal usage doctrine is widely called the "dictionary principle" in English and Commonwealth sources. See, e.g., LAW REFORM COMMITTEE, NINETEENTH REPORT: INTERPRETATION OF WILLS, CMND. No. 5301, at 16 (1973).

on treating these cases as construction rather than reformation is wholly understandable in light of the traditional concern to avoid the problem of unattested language that would arise if they admitted that they were reforming wills. The personal usage doctrine is, therefore, another device for achieving reformation-like results under the guise of construction.

C. Implication of Future Interests

The construction rubric is used blatantly to remedy mistakes of omission when courts purport to imply future interests. The court "constructs" an interest out of the so-called general dispositive plan of the testator in cases where a "gap" in the disposition was left by the draftsman. Theoretically, of course, no gap ever occurs in any disposition, because under our structure of estates a transferor is deemed to have "retained" any interest not expressly transferred.⁶⁰ In the case of testamentary transfer, this retained interest should pass either to the testator's residuary devisees or (if the disposition that contains the gap was a residuary devise) to his heirs by intestate succession. Hence, in these cases the courts are consulting the general dispositive plan of the testator as the source of two elements in the construction process. The plan is first used to overcome the idea that a reversionary interest was retained. Second, the plan must supply, by implication, the content of the constructed, gap-filling interest.

Among the recurrent situations that have given rise to an implied future interest is the dispositive plan "to A for life, then to B if A dies *without* issue." If A dies *with* issue, a remainder in favor of such issue has been implied from, or constructed out of, the disposition, on the ground that the nature of the condition attached to B's remainder makes it highly probable that the testator's primary objective was to benefit A's issue if A left any.⁶¹ Similarly, when a testator confers a special power of appointment on a donee, specifying a group of objects such as the donee's issue, a gift in default of appointment has been implied in favor of such issue where the testator himself did not expressly provide for takers in default.⁶² Another dispositive pattern from which future inter-

⁶⁰ See L. WAGGONER, *FUTURE INTERESTS IN A NUTSHELL* 16-17, 41-48 (1981).

⁶¹ See RESTATEMENT OF PROPERTY § 272 (1940). Cases are collected in 5 AMERICAN LAW OF PROPERTY § 21.34, at 184-85 (A. Casner ed. 1952 & Supp. 1962); 2 L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 842, at 327-31 (2d ed. 1956 & Supp. 1981).

⁶² See RESTATEMENT OF PROPERTY § 367 (1940). Cases are collected in 5 AMERICAN LAW OF PROPERTY, *supra* note 61, § 23.63; 2 L. SIMES & A. SMITH, *supra* note 61, §§ 1032-33.

ests have been implied is a direction in a trust (which may arise under a will) to pay the income to A and B for their lives, corpus on the death of the survivor to X. When one of the income beneficiaries dies, courts have implied a cross remainder for life in the income in favor of the surviving one.⁶³ Beyond these recurrent situations there have been other cases in which the courts have implied future interests to fill dispositive gaps when the disposition was complex enough to persuade the court that the testator did not intend to retain any reversionary interest.⁶⁴ Some of these cases that have "gone furthest in supplying language for the testator" ⁶⁵ have gone "to the extent of implying limitations of future interests on the basis of a discovered scheme of disposition, for which there is not even a fragment of language specifically declaring the dispositive intention." ⁶⁶

In the future interests cases, there usually is no extrinsic evidence offered that bears directly on the question at issue, for the reason that none exists. The testator typically never focused on the question, and he formed no actual intention on the matter. The unattested intention that is being effected in such cases is therefore probable or imputed as opposed to actual intention. The evidence in these cases is, therefore, often considerably weaker than the evidence of mistaken omission in our prototypical no-reformation case, *Mahoney v. Grainger*. Nevertheless, the idea that words can be inserted into a will in the guise of construction is widely accepted. The Wills Act is not seen as posing an obstacle to this process because the inserted words are deemed to be constructed out of, or implied from, the attested words. The inserted words are thus seen as having the imprimatur of attestation.

For a telling illustration of the inconsistency between the no-reformation rule and the device of implying future interests, we point to a pair of cases decided on the same day by the same court. *In re Estate of Calabi* ⁶⁷ fits the usual no-reformation pattern. The

⁶³ See RESTATEMENT OF PROPERTY § 115 (1936); 5 AMERICAN LAW OF PROPERTY, *supra* note 61, § 21.35; 2 L. SIMES & A. SMITH, *supra* note 61, § 843; Browder, *Trusts and the Doctrine of Estates*, 72 MICH. L. REV. 1507, 1542-45 (1974). Browder's article contains a comprehensive account of implied gifts of income in a wide variety of settings. *Id.* 1531-75.

⁶⁴ See O. BROWDER & L. WAGGONER, FAMILY PROPERTY TRANSACTIONS: FUTURE INTERESTS 237-55 (3d ed. 1980); see also 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 325 (Rohan rev. ed. 1971); 2 L. SIMES & A. SMITH, *supra* note 61, § 844.

⁶⁵ 2 L. SIMES & A. SMITH, *supra* note 61, § 844, at 340.

⁶⁶ Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1, 19 (1963).

⁶⁷ 22 Misc. 2d 173, 196 N.Y.S.2d 443 (Sur. Ct. 1959).

testator's will, drafted by counsel, divided the residue of his estate into four trusts. Trusts C and D were to receive one-twelfth each of the residue. For Trusts A and B the will spelled out the trust terms and identified the beneficiaries but omitted the terms and beneficiaries for Trusts C and D. The one-sixth of the residue not expressly disposed of was held to pass by intestacy to the testator's heirs, despite an allegation that Trusts C and D were intended to be for the benefit of the testator's grandchildren until each reached the age of 24. The court noted that no supporting evidence of this allegation was submitted, but "if such supporting evidence were available it would not be admissible."⁶⁸

But in the next case, *In re Estate of Dorson*,⁶⁹ the construction rubric allowed the court to supply omitted language. The testator's will divided the residue of his estate into two trusts, called Funds A and B. The testator's widow was the initial income beneficiary of both funds; when her interest terminated, each fund was to be divided into three parts, one part for each of the testator's three children. His daughter Marjorie was the beneficiary of Part 2 of both Fund A and Fund B. Part 2 of Fund A provided for the income to be paid to Marjorie until she reached 35, at which time she was to receive one-third of the corpus; the income from the remaining two-thirds of corpus was to be paid to her until she reached 40, at which time one-half of the remaining corpus was to be paid over to her; the income from the final segment of corpus was to be paid to her until she reached 45, whereupon she was to receive the entire remaining corpus. Part 2 of Fund B contained identical language, except that the language directing that one-half of the remaining corpus be paid to Marjorie at age 40 was omitted. The court inserted that language into Fund B, saying that "[t]he testator's general dispositive scheme is clearly discernible from a reading of the will" ⁷⁰

Dorson was as much a case of mistaken omission as *Calabi*. What, then, accounts for the opposite results? If the court had been obliged to justify its different treatment of the two cases, it would doubtless have pointed to the no-extrinsic-evidence rule. In *Calabi*, extrinsic evidence would have been necessary to prove the contents of the omitted terms, as well as the circumstances by which the mistake occurred. In *Dorson*, the court was able to turn a blind

⁶⁸ *Id.* at 174, 196 N.Y.S.2d at 445 (citations omitted).

⁶⁹ 22 Misc. 2d 945, 196 N.Y.S.2d 344 (Sur. Ct. 1959).

⁷⁰ *Id.* at 948, 196 N.Y.S.2d at 347.

eye to such extrinsic evidence; it could parse the missing language from the text. But there is no reason to think that the court's fact-finding was made any more reliable in either case by excluding the evidence that might have explained the mistake; we have seen repeatedly how the courts accept and act upon such evidence when the remedy to which it gives rise does not oblige the court to insert unattested language into the will in seeming violation of the Wills Act formal requirements.

The real difference between *Dorson* and *Calabi* is, once again, the theory of remedy. The mistakenly omitted language could be inserted in *Dorson* because the construction rubric granted it the imprimatur of attestation, whereas for cases like *Calabi* there is no comparable theory. We shall show in part IV that such a theory is indeed available, and that it has a long common law pedigree in the most comparable field of private law, mistakes in instruments that must satisfy the formal requirements of the Statute of Frauds.

D. Wills Lacking Testamentary Intent

The so-called "sham will" cases constitute another well-known sphere of the traditional law of wills in which direct declarations of the testator's intent are admissible to contradict unambiguous statements in his will. The sham will cases show the courts dealing confidently with extrinsic evidence bearing on matters of inducement and intent, matters that are also the staple subjects of mistake claims.

A valid will must not only be executed with Wills Act formality; it must also be executed with testamentary intent. Especially when the governing Wills Act is one that authorizes holographic wills (in which handwriting in effect substitutes for attestation), many a casual letter possesses Wills Act formality. Even the formalities for attested wills are common enough to other types of legal documents, and instruments that have nothing to do with testation could be said to comply with the Wills Act. It is the requirement of testamentary intent that prevents such things from qualifying as wills.

Testamentary intent is ordinarily inferred without difficulty from the contents of a will. When the document is captioned "Last Will and Testament" and purports to dispose of the estate, there is seldom any objection that it lacks testamentary intent. When, however, there is such an objection, the important point for our purposes is that most Anglo-American courts will consider the

objection on the merits,⁷¹ even though the objection must rest entirely on extrinsic evidence contrary to the unambiguous language of the will.

The leading American case is *Fleming v. Morrison*.⁷² Francis Butterfield's will, prepared by a lawyer at Butterfield's request, was in proper form, *recited that it was the testator's will*, and was signed by Butterfield and the proper number of attesting witnesses. At the contest of the will, however, Butterfield's attorney was permitted to testify that after the execution ceremony had been completed and the witnesses had departed, Butterfield told the lawyer that the will "was a 'fake' will, made for a purpose," which was to induce the sole legatee of the purported will, Mary Fleming, to have sexual intercourse with Butterfield.⁷³

Fleming v. Morrison is an ugly case on which to rely, because it allowed an intentional wrongdoer (actually, the successor-in-interest to the wrongdoer) to plead his own act of deception. On the merits, we think that his conduct should have estopped him. But we think that the courts are correct to receive evidence on the question of whether a seeming will lacked testamentary intent; we think that the leading English case is correct in articulating a clear-and-convincing standard for testing such evidence;⁷⁴ and we see nothing objectionable in remedying a sham will case in which, unlike *Fleming v. Morrison*, remedy does not reward fraud.⁷⁵

If extrinsic evidence that contravenes the literal terms of a will is so inherently suspect that it must be excluded when offered in mistake cases, why is it admitted in cases like *Fleming v. Morrison*? Again, we infer that the real reason has to do with the ease of remedy rather than with the dangers of the evidence. In a case like *Fleming v. Morrison*, if the evidence is strong enough to persuade

⁷¹ See 1 PAGE ON WILLS, *supra* note 4, § 5.10; Annot., 21 A.L.R.2d 319 (1952 & Supps. 1970 & 1981).

⁷² 187 Mass. 120, 72 N.E. 499 (1904).

⁷³ *Id.* at 122, 72 N.E. at 499.

⁷⁴ *Lister v. Smith*, 3 Sw. & Tr. 282, 289, 164 Eng. Rep. 1282, 1285 (1863) (the evidence of want of testamentary intent must be "very cogent and conclusive").

⁷⁵ For example, the Masonic will cases, in which the question was whether a will possesses testamentary intent when executed as part of the initiation rite of the Masonic order, which obliged members who had not previously made a will to do so during the rite. The cases differ in result according to particular evidence bearing on the intent of each testator. See, e.g., *Vickery v. Vickery*, 126 Fla. 294, 170 So. 745 (1936); *Shiels v. Shiels*, 109 S.W.2d 1112 (Tex. Civ. App. 1937); *In re Estate of Watkins*, 116 Wash. 190, 198 P. 721 (1921).

the court despite the well-known dangers of such evidence,⁷⁶ the court can remedy the matter without having to insert unattested language into the will in seeming violation of the Wills Act attestation requirement. Since the entire will lacks testamentary intent, the remedy is to deny it probate.

A quite similar rationale underlies the "striking out" cases discussed above⁷⁷ that deal with misdescriptions by disregarding the mistaken language and then construing the resulting blanks. In *Patch v. White*, when "lot 6 of square 403" was effectively rendered as "lot [blank] of square [blank]," the court was determining that the misdescriptions lacked testamentary intent and could be disregarded. *Patch v. White* in effect involves partial denial of probate for want of testamentary intent.⁷⁸ If the courts were not so frightened of the Wills Act, they would not meander in cases like *Patch v. White*. The device of striking out and then construing the resulting blanks is sufficiently awkward (by comparison with reformation) that it leaves little room for doubt about why it is done: It gives the appearance of Wills Act compliance.

E. *Dependent Relative Revocation*

The "dependent relative revocation" rule (hereafter DRR) provides a further example of the courts' willingness under traditional law to consult extrinsic evidence of mistake when a theory of remedy is available that avoids seeming conflict with the Wills Act attestation requirements. The rule operates by implying a condition that defeats the testator's unequivocal revocation.

The leading case of *Estate of Callahan*⁷⁹ is especially instructive. The testatrix destroyed her 1944 will in the belief that the effect of doing so would be to revive her 1940 will. Under the governing Wisconsin law, however, the revival rule was not in force. The attorney who drafted the wills testified that sometime after the

⁷⁶ *Lister v. Smith*, 3 Sw. & Tr. 282, 288, 164 Eng. Rep. 1282, 1285 (1863) ("The momentous consequences of permitting parol evidence thus to outweigh the sanction of a solemn act are obvious. It has a tendency to place all wills at the mercy of a parol story that the testator did not mean what he said.").

⁷⁷ See *supra* text accompanying notes 28-46.

⁷⁸ Technically, the English courts deny probate to mistaken descriptions of property or devisee. *E.g.*, *Goods of Boehm*, [1891] P. 247; for other cases see Lee, *Correcting Testators' Mistakes: The Probate Jurisdiction*, 33 CONVEYANCER & PROP. LAW. 322 (1969). The American courts accomplish the same result by disregarding the mistaken parts in construction rather than probate proceedings. See Henderson, *supra* note 47, at 357.

⁷⁹ 251 Wis. 247, 29 N.W.2d 352 (1947).

testatrix destroyed her 1944 will, she told him that she had done it in order to reinstate the 1940 will.⁸⁰ The court applied the DRR rule to hold that the 1944 will was still valid. It said:

The doctrine of dependent relative revocation is based upon the testator's inferred intention. It is held that as a matter of law the destruction of the later document is intended to be conditional where it is accompanied by the expressed intent of reinstating a former will and where there is no explanatory evidence. Of course if there is evidence that the testator intended the destruction to be absolute, there is no room for the application of the doctrine of dependent revocation.⁸¹

Granting that the testatrix's destruction of her 1944 will was done under a mistake on her part as to the legal consequences of her act, the court was hardly being candid in saying that her revocation was conditional on the correctness of her assumption about the legal consequences of her act. No one who actually intended to effect a conditional revocation of a document would completely destroy it. The truth is that the textatrix meant to revoke her 1944 will, but formed her intention to revoke under the inducement of a mistake.

DRR is a mistake doctrine. This was apparent from one of the first English decisions on the subject,⁸² and the leading textbook, Atkinson, emphasizes the point well:

When a testator purports to revoke his will while laboring under a mistake of law or fact in connection therewith, the courts often declare that revocation is dependent upon the existence of the situation as believed by the testator and accordingly hold that the will is not revoked. Instead of this fiction of conditional revocation, it is more realistic to treat the problem as one of mistake, holding the revocation absolute or void in accordance with which position the individual testator would probably have preferred.⁸³

A DRR case obliges a court to canvass extrinsic evidence in order to make a determination of imputed intent about the ques-

⁸⁰ Actually the testatrix's husband spoke for both himself and his wife, and in the circumstances the court deemed his statement to express her intention. *Id.* at 250, 256, 29 N.W.2d at 353, 356.

⁸¹ *Id.* at 255, 29 N.W.2d at 355.

⁸² *Onions v. Tyrer*, 1 P. Wms. 343, 345-46, 24 Eng. Rep. 418, 419 (1716) (a revocation "proceeding from a mistake . . . is properly relievable under the head of accident").

⁸³ T. ATKINSON, *supra* note 47, § 88, at 452.

tion of whether, had the testator known of his mistake, he would have preferred the will that he seemingly revoked over intestacy or a former will. The explanation commonly given for permitting the DRR exception to the no-mistake rule is unsatisfactory but revealing. It is said that since cases of revocation by physical act are intrinsically ambiguous on the question of whether the act was accompanied by the requisite intent to revoke (i.e., was a will shredded by accident, or in order to revoke it?)⁸⁴ extrinsic evidence must necessarily be received to resolve that point. However, the DRR rule extends beyond physical-act revocation to cases of revocation by subsequent instrument;⁸⁵ and in any event, if the courts were consistent about the supposed virtues of excluding extrinsic evidence of mistake, they could easily limit their inquiry into a testator's intent in a revocation case by refusing to investigate whether a mistake of purpose vitiated a seemingly intended revocation. Atkinson says: "In the revocation cases we are always into the matter of the testator's state of mind in order to determine whether his acts were intended as a revocation. It is only going one step further to examine into the motivation behind an act intended as a revocation."⁸⁶ But since that "one step further" does not have to be taken, and since it is not taken in other instances of mistake to which the general no-reformation rule applies, the question is why the step is taken under DRR. The answer, we think, is that the "conditional intent" rubric of DRR facilitates a type of remedy that does not conflict with traditional notions of Wills Act compliance. The remedy is to deny effect to the revocation, hence to enforce the duly attested will that was attempted to be revoked. To be sure, DRR cases can sometimes present real difficulties on the question of whether the testator would have preferred reinstatement over revocation and intestacy had he known of his mistake. The point has been made that the clumsy DRR label sometimes hinders courts from recognizing and dealing with those questions,⁸⁷ further evidence of the price we pay for refusing to deal forthrightly with mistake cases.

⁸⁴ E.g., *In re Estate of Bakhaus*, 410 Ill. 578, 102 N.E.2d 818 (1951).

⁸⁵ E.g., *Linkins v. Protestant Episcopal Cathedral Foundation*, 187 F.2d 357 (D.C. Cir. 1950); *In re Estate of Kaufman*, 25 Cal. 2d 854, 155 P.2d 831 (1945); *La Croix v. Senecal*, 140 Conn. 311, 99 A.2d 115 (1953). *Contra Crosby v. Alton Ochsner Medical Foundation*, 276 So. 2d 661 (Miss. 1973) (5-to-4 decision).

⁸⁶ T. ATKINSON, *supra* note 47, § 88, at 455.

⁸⁷ Palmer, *Dependent Relative Revocation and Its Relation to Relief for Mistake*, 69 MICH. L. REV. 989 (1971).

F. Reformation to Cure a Perpetuity Violation

It is a great curiosity that several jurisdictions have applied an express reformation doctrine in order to revise dispositions in wills that violate the Rule Against Perpetuities. For example, the Hawaii Supreme Court held in 1970 in a case involving a testamentary trust "that any interest which would violate the Rule Against Perpetuities shall be reformed within the limits of that rule to approximate most closely the intention of the creator of the interest."⁸⁸

This reformation doctrine, also known as the equitable modification⁸⁹ or perpetuities-cy pres⁹⁰ doctrine, may be traced to the 1891 New Hampshire case of *Edgerly v. Barker*.⁹¹ Although countless perpetuity violations occurred and were litigated after *Edgerly v. Barker* was decided, the decision gained no adherents for over 70 years. Then in 1962 the Supreme Court of Mississippi followed it;⁹² Hawaii joined in 1970⁹³ and the West Virginia court in 1980.⁹⁴ Legislation has instituted the same principle in five states,⁹⁵ al-

⁸⁸ *In re Estate of Chun Quan Yee Hop*, 52 Hawaii 40, 46, 469 P.2d 183, 187 (1970).

⁸⁹ See *Berry v. Union Nat'l Bank*, 262 S.E.2d 766, 770 (W. Va. 1980).

⁹⁰ See *Edgerly v. Barker*, 66 N.H. 434, 467, 469, 474, 31 A. 900, 911, 913, 916 (1891).

⁹¹ *Id.* at 434, 31 A. at 900.

⁹² *Carter v. Berry*, 243 Miss. 321, 140 So. 2d 843 (1962). This decision was marred by the fact that there was no need to reform the will in order to save the remainder interest from invalidity. The details of this point are set forth in O. BROWDER & L. WAGGONER, *supra* note 64, at 437-38.

⁹³ *In re Estate of Chun Quan Yee Hop*, 52 Hawaii 40, 469 P.2d 183 (1970).

⁹⁴ *Berry v. Union Nat'l Bank*, 262 S.E.2d 766 (W. Va. 1980).

⁹⁵ CAL. CIV. CODE § 715.5 (West Supp. 1981); IDAHO CODE § 55-111 (1979); MO. ANN. REV. STAT. § 442.555 (Vernon Supp. 1982); OKLA. STAT. ANN. tit. 60, §§ 75-78 (West Supp. 1981); TEX. REV. CIV. STAT. ANN. art. 1291b (Vernon 1980). In addition, statutes in four other states authorize reformation in combination with the wait-and-see method of perpetuity reform, so that reformation comes into operation only if a perpetuity violation arises after a period of waiting. KY. REV. STAT. § 381.216 (1972); OHIO REV. CODE ANN. § 2131.08(C) (Page Supp. 1982); VT. STAT. ANN. tit. 27, § 501 (1975); WASH. REV. CODE ANN. § 11.98.030 (1967). Statutory provisions in three states direct a limited form of reformation by providing that where an interest would be invalid because it is made to depend upon any person attaining or failing to attain an age in excess of 21 years, the age contingency is to be reduced to 21 years. FLA. STAT. ANN. § 639.22(4) (West Supp. 1982); ILL. ANN. STAT. ch. 30, § 194(c)(2) (Smith-Hurd Supp. 1981); N.Y. EST. POWERS & TRUSTS LAW § 9-1.2 (McKinney 1967). Finally, four states provide for a reduction of age contingencies to 21 if the interest is still invalid after waiting until the termination of one or more life estates in persons in being at the creation of the interest (a restricted type of wait-and-see). CONN. GEN. STAT. ANN. § 45-96 (West 1981); ME. REV. STAT. ANN. tit. 33, § 102 (1978); MD. EST. & TRUSTS CODE ANN. § 11-103(b) (1974); MASS. ANN. LAWS ch. 184A, § 2 (Michie/Law Co-op 1977).

though for our present purpose the interesting development has been the willingness of four state supreme courts to act without legislation.

These judicial and legislative adoptions are usually seen as part of the larger movement toward perpetuity reform that has taken place in recent decades. There has been a growing consensus that the Rule Against Perpetuities works too harshly at times. Whereas John Chipman Gray taught that a disposition should first be construed without regard to the Rule Against Perpetuities, and then the Rule should be "remorselessly" applied to the provisions so construed,⁹⁶ there is today considerable support for a rather opposite constructional preference: Where an instrument is fairly susceptible to two interpretations, of which only one would result in a perpetuity violation, the other should be adopted.⁹⁷ This constructional preference in favor of validity does not purport to relieve against the Rule in cases that are not susceptible to benign interpretations. Several methods of comprehensive reform have, therefore, been devised and in one version or another adopted in some states, mostly by legislation. In addition to reformation, two other strategies have been used: (1) statutory repair of certain categories of violation, and (2) the much-debated "wait-and-see" doctrine.⁹⁸

The emphasis on the general objective of perpetuity reform has masked somewhat the true nature of the reformation method. Both statutory repair and wait-and-see are methods of altering the Rule itself or some of its underlying assumptions. Under the statutory repair method, certain dispositions are validated that would have been invalid under the Rule in its traditional form. The wait-and-see method leaves offending dispositions intact and renders them valid if the questioned interest vests within the perpetuity period. Judicial reformation has been seen in a similar light—and this is the phenomenon to which we wish to draw attention. The Hawaii court, for example, justified adopting the reformation approach without statutory authorization because "[a]s a judge-made rule of

⁹⁶ J.C. GRAY, *RULE AGAINST PERPETUITIES* § 629, at 599 (4th ed. 1942).

⁹⁷ *E.g.*, *Davis v. Rossi*, 326 Mo. 911, 34 S.W.2d 8 (1930); *Southern Bank & Trust Co. v. Brown*, 271 S.C. 260, 246 S.E.2d 598 (1978). *See* RESTATEMENT OF PROPERTY § 375 (1940). Some courts still adhere to Gray's proposition, however. *E.g.*, *Colorado Nat'l Bank v. McCabe*, 143 Colo. 21, 353 P.2d 385 (1960); *Continental Ill. Nat'l Bank & Trust Co. v. Llewellyn*, 67 Ill. App. 2d 171, 214 N.E.2d 471 (1966) (reversed by ILL. ANN. STAT. ch. 30, § 194(c)(1)(a) (Smith-Hurd Supp. 1980)).

⁹⁸ *See generally* L. WAGGONER, *supra* note 60, at 286-338.

law, [the Rule Against Perpetuities] is not so firmly ensconced in Hawaii that this court cannot deal with it like any other rule of judicial origin which must change with the times.”⁹⁹

In fact, however, the reformation method does not alter the Rule at all. *It leaves the Rule intact and changes the disposition to conform to the Rule.* In the original *Edgerly* case, for example, the testator's grandchildren were to receive the corpus of the trust, subject to a contingency of survival to the time when the youngest grandchild reached the age of 40. Since the trust was created in the residuary clause of the testator's will, the ordinary result of the invalidity of the grandchildren's interest would have been a reversion by intestacy to his heirs (his children). The court implied, however, that the testator's will exhibited a general or predominating intention to deprive his children of the corpus of the trust and to give it instead to his grandchildren.¹⁰⁰ The testator's "intent that the grandchildren shall not have the remainder till the youngest arrives at the age of forty years is modified by his intent that they shall have it, and that the will shall take effect as far as possible. The forty years are reduced to twenty-one by his general approximating purpose, which is a part of the will."¹⁰¹ The other three cases in which the reformation method was adopted also involved age (or period-in-gross) contingencies in excess of 21. Each court reduced the age (or period in gross) to 21. The wills said 21-plus, the courts said 21.

Since the dispositions that were reformed in all these cases were contained in testamentary rather than inter vivos trusts, it is somewhat surprising that very little, if any, attention was devoted in the opinions to justifying the insertion of unattested language into the wills in apparent defiance of the Wills Act. We suspect that this inattention arose from the courts' preoccupation with the general problem of perpetuity reform. Another explanation is that it is possible to analyze what these courts have actually done as construction rather than as reformation: The general dispositive plan of the testator showed an intent not to create a reversionary interest. Thus the court is justified in constructing a future interest to fill the gap. The content of the constructed interest is to be guided by the content of the invalid interest. The invalid interest, which was created by attested language, is replaced by a constructed one in

⁹⁹ *Chun Quan Yee Hop*, 52 Hawaii at 43, 469 P.2d at 185.

¹⁰⁰ 66 N.H. at 452-53, 31 A. at 904-05.

¹⁰¹ *Id.* at 475, 31 A. at 916.

favor of the same takers, but the contingency of survivorship attached to the constructed interest is formulated so that it must occur if at all within the perpetuity period. This is in fact what the New Hampshire court was alluding to when it said in *Edgerly v. Barker* that the testator's "general approximating purpose . . . is a part of the will."¹⁰² This theory was also advanced in support of the reformation principle for perpetuity cases recently adopted (in combination with wait-and-see) in the *Restatement (Second) of Property*.¹⁰³

But the courts in Mississippi, Hawaii, and West Virginia have not described what they did in these cases in this way. They have openly spoken of reformation. Not only have they enforced unattested language,¹⁰⁴ but they have admitted what they are doing. They have not, however, explained why the Wills Act permits it.

¹⁰² *Id.*

¹⁰³ RESTATEMENT (SECOND) OF PROPERTY § 1.5 comment a (Tent. Draft No. 2, 1979).

¹⁰⁴ See *In re Estate of Chun Quan Yee Hop*, 52 Hawaii at 47, 469 P.2d at 187 (the thirty year period is "reduced to twenty-one years"); *Carter v. Berry*, 243 Miss. at 377, 140 So. 2d at 855 ("[t]he twenty-five years are reduced to twenty-one"); *Berry v. Union Nat'l Bank*, 262 S.E.2d at 771 (the trust is "modified to reduce that twenty-five year period to twenty-one"); see also *Edgerly v. Barker*, 66 N.H. at 475, 31 A. at 916 ("[t]he 40 years are reduced to 21").

These courts are effecting putative rather than actual intent. The testator never formed any actual intent on the question because he assumed, or was led to believe by his lawyer, that his attested (and unambiguously stated) intention was valid, that his will could be carried out as written. Reformation is directed to carrying out intent that the testator probably would have formed had the problem been posed to him. It is conceivable that if fully apprised of his options the testator might not have decided to reduce the age or period-in-gross to 21. One commentator has argued that a better method of reforming instruments in order to prevent perpetuity violations would be for the court to insert a saving clause into the instrument. Browder, *supra* note 66.

A saving clause provides that, regardless of the contingencies attached to the interests created in other parts of the instrument, no interest can remain contingent beyond 21 years following the death of the survivor of a group of designated persons, such as all beneficiaries of the instrument who are living when the perpetuity period begins to run. In the unlikely event that all interests have not actually vested or failed to vest by the time that this period expires, saving clauses further provide for an absolute gift over of corpus to become effective at that time; the gift over in form-book saving clauses is typically in favor of the testator's then living descendants, or in some situations, in favor of the then current income beneficiaries of the trust.

If Browder's solution had been adopted by the courts in the reformation cases, the original attested intention of the testator probably could have been given effect without the necessity of lowering the age or period in gross to 21. If the testator himself had been told that the disposition was invalid but could be made valid either by lowering the figure to 21 or by keeping it above 21 as desired with a saving clause, there is little doubt that he would choose the latter. The latter is mostly a formality; the former requires a substantive change in the disposition, and one that the testator might have preferred not to make since he thought he had reason for imposing the age contingency in the first place.

G. Reformation to Gain a Tax Benefit?

The development of a constructional preference and its subsequent manipulation to achieve reformation-like results can be glimpsed again in the case law treating mistakes of tax planning in wills. Much of so-called estate planning is tax-motivated. The federal transfer tax laws now rival, indeed probably surpass in complexity the level of technicality achieved in some of the common law of property, notably the Rule Against Perpetuities. Failure to obtain an estate tax deduction (whether marital or charitable) because of a defect in drafting can have enormous financial consequences to the testator's intended beneficiaries. Although lawyer-draftsmen have been held liable in malpractice actions in some such cases,¹⁰⁵ the courts incline to spare them liability and to preserve the sought-after tax benefit for the testator's family.¹⁰⁶ The Treasury occupies the position of an unintended beneficiary in these cases, analogous to the reversioner who takes when a court fails to imply a future interest or to cure a perpetuity violation. When the mistake arises in a lawyer-drafted instrument, as is usually the case, the Treasury's posture is particularly unattractive. The Treasury benefits through third-party negligence—a species of wrongdoing—at the expense of the innocent intended beneficiaries. We shall point out in part IV that constructive trust law has seized upon third-party wrongdoing in other contexts as the occasion for preferring the intended beneficiaries over the reversioners, even though the intended beneficiaries have to be identified by extrinsic evidence of a necessarily unattested character.¹⁰⁷

Browder's proposed method of reformation, which clearly has much to commend it, was advanced under the supposition that the courts would receive explicit statutory authorization for this mode of reformation. Statutory authority would, of course, trump the Wills Act, overcoming the unattested language problem. Without statutory authorization, it would be more difficult, though perhaps not impossible, to justify the insertion of a saving clause into a will as nothing more than filling a gap by construction. In any event, in the only significant case to arise under any of the reformation-type statutes, the court was confronted with a remainder interest in favor of the testator's grandchildren subject to a contingency of survivorship of the time when the youngest grandchild reached 35. In applying the California reformation statute, the court—in apparent ignorance of Browder's proposal—validated the class gift by lowering the age from 35 to 21. *In re Estate of Chiglia*, 42 Cal. App. 3d 433, 116 Cal. Rptr. 827 (1974).

¹⁰⁵ *E.g.*, *Horne v. Peckham*, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979); *Bucquet v. Livingston*, 57 Cal. App. 3d 914, 129 Cal. Rptr. 514 (1976).

¹⁰⁶ See *infra* cases cited at note 108. Recent cases contrary to this trend are *Bryan v. United States*, 286 Md. 176, 406 A.2d 423 (1979); *Estate of Benson*, 447 Pa. 62, 72, 285 A.2d 101, 106 (1971).

¹⁰⁷ See *infra* text accompanying notes 190-211.

A constructional preference for favorable tax consequences similar to that in perpetuity law has emerged in some jurisdictions, notably Massachusetts. The Supreme Judicial Court said in a 1974 decision: "It would be a rare case in which . . . an ambiguity in a will should be resolved by attributing to the testator an intention which as a practical matter is likely to benefit the taxing authorities and no one else."¹⁰⁸ In 1977 the court applied this preference in *Dana v. Gring*.¹⁰⁹ The decedent had been the income beneficiary and one of three trustees of a testamentary trust created by her father's will. It was arguable that under the terms of the trust the decedent might have had the power during her lifetime to invade the corpus for her own benefit, which would have made the corpus includible in her gross estate under section 2041 of the Internal Revenue Code.¹¹⁰ The court noted that while under normal fiduciary principles a trustee-beneficiary may not participate in decisions regarding distributions of corpus to herself, this principle yields to a contrary intent on the part of the creator of the trust. Since the language of the instrument in question was susceptible of either construction, the court invoked the constructional preference announced earlier and decided that her father's will excluded the decedent from participating in the exercise of the power to invade. The trust corpus was, therefore, not includible in her gross estate.¹¹¹

¹⁰⁸ *Putnam v. Putnam*, 366 Mass. 261, 271, 316 N.E.2d 729, 737 (1974) (citations omitted). Such a constructional preference was openly acknowledged earlier in Massachusetts, e.g., *Mazzola v. Myers*, 363 Mass. 625, 638, 296 N.E.2d 481, 490 (1973), and may have been operating there even before, see, e.g., *Woodberry v. Bunker*, 359 Mass. 239, 268 N.E.2d 841 (1971); *Old Colony Trust Co. v. Silliman*, 352 Mass. 6, 223 N.E.2d 504 (1967). This constructional preference operates only when it does not favor one beneficiary to the detriment of another. See *Persky v. Hutner*, 369 Mass. 7, 15, 336 N.E.2d 865, 869 (1975). The adoption of a constructional preference for favorable tax consequences is to be distinguished from cases in which there is a recitation in the will stating an intent that a certain tax consequence be secured, and such recitation serves to resolve an ambiguity, e.g., *Guiney v. United States*, 425 F.2d 145 (4th Cir. 1970). In other cases extrinsic evidence of such intent has been received for the purpose, e.g., *Virginia Nat'l Bank v. United States*, 443 F.2d 1030 (4th Cir. 1971); *Estate of Trunk v. Commissioner*, 37 T.C.M. (CCH) 497 (1978).

¹⁰⁹ 374 Mass. 109, 371 N.E.2d 755 (1977).

¹¹⁰ I.R.C. § 2041 (1976).

¹¹¹ Under *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967), a decision of the highest court in a state is controlling on the federal taxing authorities. Cf. *Ashenhurst Estate v. Commissioner*, No. 12546-80, T.C. Memo. 1982-102 (Feb. 25, 1982). In *Ashenhurst*, a lower state court in Idaho forthrightly reformed a decedent's unambiguous will because extrinsic evidence showed that it was the product of "mistake of the scrivener and . . . of the testatrix as to the meaning and effect of the language contained in [the will]" As reformed, the will devised an interest to the decedent's surviving spouse that would qualify for the estate tax

Recast in the terms with which we have become familiar in looking at the law of testamentary mistake, *Dana v. Gring* simply applied the constructional preference for favorable tax consequences in order to choose between two interpretations of attested language. But there are cases in which the constructional preference, unaided by extrinsic evidence of the testator's intent, does not do the job. In *Estate of Mittleman v. Commissioner*,¹¹² the court pretended to apply the constructional preference anyhow, although reformation would have been a more candid description of the result. The question was whether the value of a trust created by the decedent's will for his widow qualified for deduction from the gross estate under the estate tax marital deduction, section 2056 of the Code. The Code explicitly requires that the surviving spouse must be "entitled for life to all the income"¹¹³ from the trust if it is to qualify. But the trust terms in the decedent's will failed to state that all the income was to be paid to his widow. The will said only that one of the "purposes" of the trust was "[t]o provide for the proper support, maintenance, welfare and comfort of my beloved wife, Henrietta Mittleman, for her entire lifetime."¹¹⁴ Since all the other provisions of the trust explicitly pertained to the disposition of the corpus,¹¹⁵ this provision must have been intended to pertain to the income.

When the right to the income is governed by an ascertainable standard, such as the one set forth in Mittleman's will, the well-settled common law rule is that the income beneficiary is entitled

marital deduction. The Tax Court, however, held that under *Bosch* the state court's reformation was not controlling for federal tax purposes, absent acceptance of a reformation doctrine by the Supreme Court of Iowa.

¹¹² 522 F.2d 132 (D.C. Cir. 1975). See also *Sawyer v. Sawyer*, 53 Ohio App. 3d 323, 374 N.E.2d 166 (1977), accepted as controlling for tax purposes in *Estate of Sawyer v. Commissioner*, 73 T.C. 1 (1979); *Elliot v. Elliot*, 349 So. 2d 1092 (Ala. 1977); *Hurst v. First Kentucky Trust Co.*, 560 S.W.2d 819 (Ky. 1978).

¹¹³ I.R.C. § 2056(b)(5) (1976).

¹¹⁴ 522 F.2d at 133 n.1.

¹¹⁵ One such provision conferred on the trustees the discretionary power during the widow's lifetime to invade the corpus of the trust "for the proper support, maintenance and welfare of my wife, Henrietta Mittleman." 522 F.2d at 133 n.1. (The inclusion of such a power is not necessary to qualify the trust for the marital deduction, but its inclusion does not disqualify the trust either.) The other provision conferred on the decedent's widow a general testamentary power of appointment over the "balance of the trust estate" remaining at her death, and created a gift in default of appointment to specified persons of "such portion or all of the principal of the trust or such interests or estates therein as shall not have been validly appointed by her . . ." *Id.* (The widow's power of appointment meets a Code requirement for qualification under I.R.C. § 2056(b)(5) (1976); the inclusion of a gift in default of appointment is neither required nor disqualifying.)

to only so much of the income as is necessary for the stated purpose.¹¹⁶ Where, then, does the excess income go? There is a dispositive gap in the express terms. As we have noticed earlier,¹¹⁷ gaps do not persist in the common law theory of estates, because any interest not expressly disposed of is considered to have been retained by the testator. The interest would revert to his residuary legatees (or in the last resort to his heirs as intestate takers). The courts, however, have been convinced that most testators who have neglected to provide for disposition of the excess trust income would prefer it to pass to the trust remaindermen rather than by way of reversion. Accordingly, they construct out of the general dispositive scheme an implied direction that the excess income be accumulated and added to the corpus of the trust.¹¹⁸ This is an application of a more generalized rule of construction, persuasively advanced by Browder, that trust income implicitly accrues to corpus except as otherwise disposed of.¹¹⁹

¹¹⁶ RESTATEMENT (SECOND) OF TRUSTS § 128 comment e (1959).

¹¹⁷ See *supra* text accompanying note 60.

¹¹⁸ See, e.g., *Thurber v. Thurber*, 43 R.I. 504, 112 A. 209 (1921). Other cases are collected and the matter is discussed in Browder, *supra* note 63, at 1564-65. The *Mittleman* court, however, never acknowledged the existence of such authority. On the contrary, the court in a footnote cited *Grabois v. Grosner*, 363 F.2d 979, 982 (D.C. Cir. 1966), for the proposition that accumulations of income are disfavored and require "strong and clear language" to permit them. 522 F.2d at 138 n.40. The *Grabois* court cited no authority for such a pronouncement. As a general proposition, it is conceded that accumulations of income for a very long period of time are considered objectionable and directions therefor may in fact be held to be invalid as against public policy. See Browder, *supra* note 63, at 1549-50; RESTATEMENT (SECOND) OF PROPERTY § 2.2 (Tent. Draft No. 2, 1979). But accumulation of excess income during the period of a life in being, as in *Mittleman*, is not affected by this principle. Furthermore, the *Grabois* case itself is inapposite to the question raised by *Mittleman's* will. The will in *Grabois* created several trusts. The trust at issue was established for the testator's incompetent daughter, Marian. The will stated that "in the case of the [trust] set apart for . . . Marian . . . my Trustees . . . shall pay over the net income . . . to my daughter for the term of her natural life." 363 F.2d at 980. A later provision, however, which applied generally to all the trusts created by the will, authorized the trustees "in the exercise of their absolute and uncontrolled discretion, to apply to the use of any beneficiary hereunder the whole or any part of the income or principal . . . as my said Trustees may deem proper and necessary in the event of any serious illness, or other calamity, or because of the necessity of such beneficiary to have additional funds for her living expenses." The court held that the controlling provision regarding the income of Marian's trust was the earlier one, the one that specifically dealt with that trust. Consequently, Marian (or her committee) was held to be entitled to all the income from her trust. The court rejected the trustees' contention that she was entitled to only so much as was necessary for the purposes stated in the later, more general provision, with the excess income to be accumulated. *Grabois*, therefore, was a patent ambiguity case in which the court had to choose between effecting one or the other of two attested but inconsistent provisions.

¹¹⁹ Browder, *supra* note 63, at 1548-52, 1563, 1564-65.

But in the *Mittleman* case, the court, without acknowledging (and perhaps unaware of) the existence of the contrary authority, held that the decedent's widow was entitled to all the income from the trust. Although at one point the court described what it did as conventional construction of ambiguous language,¹²⁰ the reality is that the court struck from the will the provision limiting the widow's right to the income for the stated purposes and substituted a direction that all the income was to be paid to her throughout her lifetime. The court thus gave effect to unattested intention, and it did so primarily on the basis of extrinsic evidence of mistake. The court inched toward candor when it declared that in determining the testator's intent "other factors speak more eloquently than the testator's pen."¹²¹ "In the light of the all-pervasive influence of the tax laws on estate planning," the court said, "it seems entirely reasonable for courts to presume, absent contrary language, that testamentary provisions in favor of spouses are designed to qualify for the marital deduction."¹²² The court decided the case not on the basis of a presumption, however, but by consulting extrinsic evidence of the testator's intent. The attorney who drafted the will was allowed to testify:

Mr. Mittleman advised me that in the preparation of the earlier will [which Mittleman had brought to the attorney for revision], he had discussed with his counsel and with his accountant, or advisor in tax matters, the question of the marital deduction and he felt certain that the will as then prepared, which I indicated is the same as this will in its basic features, did give him the benefit of the marital deduction and, quite frankly, that was my opinion at the time, too.¹²³

Mainly on the strength of this testimony, the court in effect rewrote the decedent's will so that it would grant to his widow the right to all the income from the trust and thereby qualify for the deduction. The *Mittleman* case exemplifies, therefore, another half-hidden reformation doctrine, improperly invoking the label of constructional preference in order to pretend to have avoided the unattested language problem.

¹²⁰ 522 F.2d at 140 ("We hold . . . that where a testator intends to create a trust qualifying for the marital deduction, ambiguities in his will should, if possible, be resolved in favor of success in that endeavor.").

¹²¹ *Id.* 136.

¹²² *Id.* 139.

¹²³ *Id.* 140 n.55.

III. THE THREE RECENT MISTAKE CASES

Our theme thus far has been that the courts' ostensible concern with unreliability of extrinsic evidence is greatly overstated as a ground for the no-reformation rule. When the circumstances are such that mistake can be remedied without overtly supplementing the attested language of a will, the courts have confidently admitted and evaluated extrinsic evidence of mistake, just as they do when inter vivos transfers are alleged to be affected by mistake. The real barrier to a general reformation doctrine for mistaken wills has not been the evidentiary problem, which the courts have so often surmounted, but the problem of achieving technical compliance with the Wills Act.

This view of the matter will be sharpened by studying the three recent cases in which California, New Jersey, and New York appellate courts have remedied mistaken wills. They show that modern courts are now confident about their ability to deal with the evidence in mistake cases but still lack a theory that would permit them to deal with the issue of remedy that we have called the unattested language problem.

A. *Estate of Taff*¹²⁴

The will of Pearl Taff devised the residue of her estate to her sister Margaret, or if Margaret predeceased her (which was the contingency that in fact occurred), "to my heirs in accordance with the laws of intestate succession, in effect at my death in the State of California, or in effect in such other state or such other place as I may be resident at the time of my death."¹²⁵ Pearl died in California. Her residuary estate consisted of community property to which she had succeeded by virtue of its community character on the death of her husband. The California probate code provided that in the event such property passed by intestacy, it should descend in equal halves to the heirs of the predeceased spouse and of the decedent.¹²⁶ Accordingly, the effect of the language in Pearl's will adopting the heirship definition of the California intestacy statute would have been—if applied—to pass half of her property to the heirs of her late husband, and half to her natural heirs (who were at her death some nieces and a nephew).

¹²⁴ 63 Cal. App. 3d 319, 133 Cal. Rptr. 737 (1976).

¹²⁵ *Id.* at 322, 133 Cal. Rptr. at 739.

¹²⁶ CAL. PROB. CODE § 228 (West 1956) (current version at CAL. PROB. CODE § 229 (West Supp. 1981)).

In the trial court, Pearl's natural heirs claimed the entire estate, on the ground that Pearl meant by the language that she used to designate only them. In order to prove Pearl's actual intent, her natural heirs offered the testimony of Pearl's lawyer-scrivener, which was received against the objections of the husband's heirs. He said that Pearl had instructed him to draft her will so that the residue went "to her own family, her own blood relatives."¹²⁷ The draftsman further testified that Pearl explained to him that she did not want to provide for the family of her late husband in her residuary estate.¹²⁸ The natural heirs also adduced in evidence a letter from Pearl to Margaret, written six days before execution of the will, advising Margaret of the planned residuary disposition in favor of her or the nieces and nephews.¹²⁹

A final factor the court may have had in mind but did not discuss is that the residuary clause called for the term "heirs" to be defined by the law of Pearl's state or place of residence at death. Had Pearl died in a non-community-property state (or indeed a community-property state lacking an intestacy regime comparable to California's), her husband's heirs would not have been included in the definition of Pearl's heirs; it is highly unlikely that the testatrix would knowingly have meant the disposition of half her residuary estate to vary with such a fortuity.

The intermediate court of appeals followed the trial court and sustained the claim of Pearl's natural heirs to take the entire estate. The slender rationale of the appellate opinion gave no indication of what a startling departure the case entailed. We need only point out that the situation in *Taff* is basically a replay of our prototype mistake case, the well-known (and recently reaffirmed¹³⁰) decision of the Massachusetts Supreme Judicial Court in *Mahoney v. Grainger*—the case in which the testatrix meant to leave her estate to her cousins, but because her lawyer had her use the term "heirs," it was distributed to her aunt.¹³¹

It was the unattested language problem that led Chief Justice Rugg to conclude in *Mahoney v. Grainger* that such cases are beyond remedy. The California court in *Taff* simply ignored this

¹²⁷ 63 Cal. App. 3d at 322, 133 Cal. Rptr. at 739.

¹²⁸ *Id.*

¹²⁹ *Id.* at 323, 133 Cal. Rptr. at 740.

¹³⁰ *Gustafson v. Svenson*, 4 Mass. App. Ct. 338, 347 N.E.2d 701, 703 (1976), *aff'd*, 373 Mass. 273, 366 N.E.2d 761 (1977).

¹³¹ 283 Mass. 189, 186 N.E. 86 (1933), discussed *supra* text accompanying note 54.

fundamental issue by treating the problem as one of construction rather than reformation for mistake. The California court avoided all mention of the no-reformation rule and its traditional doctrinal foundation in the Wills Act. The court saw as the "sole issue" in the case the admissibility of the extrinsic evidence of the testatrix's true intention. The court resolved this question on the authority of a 1968 decision of the California Supreme Court, *Estate of Russell*,¹³² abrogating the no-extrinsic-evidence rule in a routine construction case, involving the identity of a beneficiary named in a will. The court in *Russell* reviewed the dissatisfaction with the rule and endorsed Wigmore's critique, saying that "it is self-evident" that proper interpretation of a will requires the judge to place himself "in the position of the testator whose language he is interpreting."¹³³

In truth, *Russell* does not decide *Taff*. *Russell* is authority for receiving extrinsic evidence, but not for using it to contradict the will. *Russell* says that if "in the light of such extrinsic evidence, the provisions of the will are not reasonably susceptible of two or more meanings, there is no uncertainty arising on the face of the will . . . and any proffered evidence attempting to show an intention *different* from that expressed by the words therein, giving them only the meaning to which they are reasonably susceptible, is inadmissible."¹³⁴

Taff thus turned *Russell* upside down, making it stand for a proposition it had expressly rejected. In the key passage, the court in *Taff* says that "the extrinsic evidence was properly received both to create the ambiguity in the word 'heirs' and to resolve the ambiguity."¹³⁵ But this way of stating the matter obliterates the

¹³² 69 Cal. 2d 200, 444 P.2d 353, 70 Cal. Rptr. 561 (1968). The testatrix in *Russell* purported to devise the residue of her estate by means of a homedrawn holograph to "Chester H. Quinn & Roxy Russell." Because Roxy was a dog, a devise to the animal would have been void for want of capacity to take. The trial court sustained Quinn's contention that the testatrix meant to leave the entire estate to him, subject to a precatory term that he care for the dog. The heir-at-law appealed, arguing that because the term in the will was unambiguous, the trial court erred in admitting extrinsic evidence. The supreme court found against Quinn on the constructional question, but endorsed the admission of extrinsic evidence, no matter how unambiguous a written instrument might seem, "to ascertain what the parties meant by the words used. Only then can it be determined whether the seemingly clear language of the instrument is in fact ambiguous." *Id.* at 209, 444 P.2d at 359, 70 Cal. Rptr. at 567.

¹³³ *Id.* at 210, 444 P.2d at 360, 70 Cal. Rptr. at 568 (citation omitted).

¹³⁴ *Id.* at 212, 444 P.2d at 361-62, 70 Cal. Rptr. at 569-70 (citations omitted, emphasis in original).

¹³⁵ 63 Cal. App. 3d at 325, 133 Cal. Rptr. at 741 (citation omitted).

fundamental distinction between ambiguity and mistake. The disputed term in *Taff* that had been mistakenly employed was quite unambiguous. The effect of the decision in *Taff* was to substitute a phrase such as "my natural heirs" for the inapt phrase that the will had employed ("my heirs in accordance with the laws of intestate succession, in effect at my death in the State of California"),¹³⁶ in order to carry out what the court conceived to be the actual or subjective intent of the testatrix. On the spurious authority of *Russell*, *Taff* reformed the will without admitting, hence without justifying, this departure from traditional law.

B. *Engle v. Siegel*¹³⁷

Within a year after the *Taff* case, the New Jersey Supreme Court relieved against mistaken will drafting in a still more remarkable case. *Engle v. Siegel* involved the wills of Albert and Judith Siegel, New Jersey domiciliaries, husband and wife, who perished with both their children in a hotel fire in 1973. The wills had been executed in 1964. Each made identical provision for the event that neither spouse nor children survived: Each estate was "to be divided between" Albert's mother Rose Siegel and Judith's mother Ida Engle "share and share alike."¹³⁸ Albert's mother died in 1967. Because she predeceased Albert and Judith, the devises to her under their wills lapsed. The lawsuit concerned the distribution of these two lapsed half shares. Ida Engle claimed the two lapsed half shares in her capacity as the surviving residuary legatee under each will; she was resisted by Albert's two siblings, the surviving children of Rose Siegel, claiming to take in place of Rose.

If the wills had been treated as silent on the subject, the routine New Jersey gap-filling statutes would have awarded the lapsed half shares to Ida Engle. In some jurisdictions the so-called anti-lapse statute would have appointed Rose's surviving children as substitutional takers, but the New Jersey version—like most—does not extend to testators' mothers (nor, a fortiori, to mothers-in-law).¹³⁹

¹³⁶ *Id.* at 322, 133 Cal. Rptr. at 739.

¹³⁷ 74 N.J. 287, 377 A.2d 892 (1977).

¹³⁸ *Id.* at 289, 377 A.2d 893 (1977).

¹³⁹ Under an anti-lapse statute such as UNIFORM PROBATE CODE § 2-605 (1977), Rose's children would have taken under Albert's will but not under Judith's, they being strangers to her line. Only under the infrequent variety of anti-lapse statute that applies to all devisees, regardless of relationship to the testator, would Rose's

The choice, therefore, would have been between allowing the lapsed share under each will to pass by intestacy (in which case Rose's surviving children would have taken as Albert's heirs in his estate but not in Judith's); or awarding the two lapsed half shares to Ida in her capacity as the surviving residuary legatee. The New Jersey statute on the construction of lapsed residuary devises, consistent with the trend of modern uniform legislation, opts for the surviving devisee, presuming that testators in general would prefer that result to partial intestacy.¹⁴⁰ In *Engle v. Siegel* the two lower courts applied the statute and awarded the entire residue of both estates to Ida Engle.¹⁴¹

The New Jersey Supreme Court refused to apply the statute governing lapsed residuary devises and instead awarded the lapsed half share in each estate to Rose's two surviving children. On the basis of extrinsic evidence of the testators' actual intent, the court awarded the two estates as though Rose's children had been expressly designated to take in the event that their mother predeceased them. The court treated them in effect as contingent residuary legatees designated by a mistakenly omitted term of each will.

As in *Taff*, the court in New Jersey relied on an earlier state supreme court precedent, *Wilson v. Flowers*,¹⁴² abrogating the general no-extrinsic-evidence rule in construction cases. And as in *Taff*, the primary evidence of the testators' actual intent that persuaded the court to vary the instruments in *Engle v. Siegel* was the testimony of the lawyer whose sloppy draftsmanship put the estate in litigation. The lawyer "testified from memory, aided by notes he had made at the conference"¹⁴³ that he had held with the testators preliminary to drafting their wills. He said that the question had been raised of making provision for the event that a common disaster left neither spouse nor children surviving. Albert and Judith conferred, and "Albert, speaking for his wife and himself, declared

surviving children have succeeded to the provision for her in both wills; e.g., D.C. CODE ANN. § 18-308 (1981); IOWA CODE ANN. § 633.273 (West 1964); TENN. CODE ANN. § 32-306 (1977); VA. CODE § 64.1-64 (1980).

¹⁴⁰ N.J. STAT. ANN. § 3A:3-14 (West 1953) (current version at *id.* § 3A:2A-25 (West Supp. 1981)); *accord* UNIFORM PROBATE CODE § 2-606(b) (1977).

¹⁴¹ The trial court and the appellate division opinions are unpublished. A law review note citing the unpublished opinions attributes the ground of decision to N.J. STAT. ANN. § 3A:3-14 (West 1953). Note, 9 SETON HALL L. REV. 359, 360 n.10 (1978). Other writing treating the case (by winning counsel) appears in Clapp, *Justice Worrall F. Mountain: The Testator's Unwritten Subjective Intent as Controlling His Will*, 10 SETON HALL L. REV. 21 (1979).

¹⁴² 58 N.J. 250, 277 A.2d 199 (1971).

¹⁴³ 74 N.J. at 295, 377 A.2d at 896.

that in that event they would like all of their property to be divided equally between their two families.”¹⁴⁴ When the lawyer observed that the term “family” was too imprecise, Albert and Judith, “after again conferring together, suggested that, in the event then being considered, their property be equally divided between their respective mothers, Rose Siegel and Ida Engle.”¹⁴⁵

Although the court used these facts to supply the term it thought the draftsman omitted, it did not speak in such terms. We reproduce the key language:

We have no difficulty in reaching the conclusion that the primary wish of each decedent, given the contingency that occurred, would have been to divide the property included in their residuary estates between the Siegel family and the Engle family. The designation of their respective mothers resulted solely from the scrivener's rejection of the word “family” as a term to describe the recipient of a testamentary benefaction. Each mother was obviously thought of as an appropriate representative of a “family.”¹⁴⁶

In order to maintain the fiction that it was engaged in mere “will construction,”¹⁴⁷ the court had to engage in a more manipulative intervention than if it had forthrightly declared that it was willing to relieve against mistake in such a case. For purposes of supposed construction, the extrinsic evidence of the testators' actual intent was made to bear upon the meaning of the terms “my mother Rose Siegel” (in Albert's will) and “my mother-in-law Rose Siegel” (in Judith's will). Albert and Judith meant “family” when they said “Rose,” the court pretended to think, and for that reason their wills could be “construed” to substitute Albert's siblings in place of his predeceased mother.

In truth, what the extrinsic evidence showed is that the lawyer did not direct Albert and Judith's attention to the need to think beyond the contingent devises to their mothers. He did not caution them that mothers typically predecease their children, hence that (in accord with elementary canons of good will drafting) the wills should make provision for a further devise on the happening of that contingency. The court was persuaded that had Albert and

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 296, 377 A.2d at 896.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 289, 377 A.2d at 893.

Judith considered the event that occurred, they would have directed that Albert's siblings (his surviving heirs) take the two half shares that lapsed on the death of Albert's mother. The court imputed this intent to Albert and Judith because the extrinsic evidence showed that they had initially intended to divide both estates between the two families.

To give the assets of both estates entirely to Mrs. Engle would seem to fly directly in the face of all the evidence bearing upon probable intent. It is perhaps pertinent to note at this point that the assets constituting the estates of both Albert and Judith were derived almost entirely from Albert's earnings. Judith had no money that had come from her own family.¹⁴⁸

The forthright way to describe what the court did is to say (1) that the court inferred from the extrinsic evidence that a term had been mistakenly omitted from the wills through drafting oversight; and (2) that the court supplied this term because the court was able to infer with a high degree of probability what content the testators would have given to the term had they expressed it.

The reluctance to admit that a case such as *Engle v. Siegel* is in truth a reformation case, even after the taboo against receiving extrinsic evidence of a testator's intent has been overcome, is noteworthy, especially since it put the court to so circuitous and unsatisfactory an exercise in pretended construction. This is all the more remarkable because—short of admitting that it is operating a reformation doctrine—the New Jersey court has been quite candid about the reach of its practice of liberally admitting extrinsic evidence. The court has characterized itself as applying a “doctrine of probable intent,” nominally as a technique of construction, a doctrine that “attributes to the testator ‘common human impulses’ and seeks to find what he would *subjectively* have desired had he in fact actually addressed the contingency which has arisen.”¹⁴⁹ This is a reformation doctrine in all but name, and hence it contradicts such a conventional statement of the no-reformation rule as Atkinson's: “[T]here is no remedy on probate for mistakes of omission. . . . Equity has no jurisdiction to reform a will for mistake,

¹⁴⁸ *Id.* at 296, 377 A.2d at 896.

¹⁴⁹ *Id.* at 291, 377 A.2d at 894 (emphasis in original). The quoted passage continues: “We are no longer limited simply to searching out the probable meaning intended by the words and phrases in the will. Relevant circumstances, including the testator's own expressions of intent . . . must also be studied, and their significance assayed.” *Id.* (citation omitted).

and an omitted devise cannot be supplied in the construction of the will." ¹⁵⁰

In concealing its reformation doctrine behind the label "probable intent," the New Jersey court has avoided facing the concerns that have sustained the opposite rule for so long. But the price of concealment is that the new doctrine remains inarticulate, unsupported, untested, unpredictable. If anything as long-entrenched as the no-reformation rule is to be set aside (and we repeat that we think it should be), the reasons should be disclosed and the limitations of the replacement rule should be thought out and declared.

C. *In re Snide* ¹⁵¹

Among the recurrent types of mistake cases, one group ¹⁵² stands out as the most pathetic. Two testators, usually husband and wife, arrange to have their wills drafted for simultaneous execution; then at the execution ceremony, usually through the negligence of the lawyer or other scrivener, each is given and signs the will drafted for the other. Until the first decision in the *Snide* case in 1978,¹⁵³ the reported American cases held such wills null.

The best known precedent is *In re Estate of Pavlinko*.¹⁵⁴ Vasil and Hellen Pavlinko signed wills meant for each other. Hellen died first but no effort was made to probate her estate. Later when Vasil died, probate was sought for the instrument actually signed by Vasil, which recited that "I, Hellen" devise my residuary estate to "my husband, Vasil," or if Vasil should predecease me, then "to my brother, Elias Martin . . ." ¹⁵⁵ The will actually prepared for Vasil but signed by Hellen also designated Elias Martin as the survivor's residuary devisee. The Supreme Court of Pennsylvania affirmed the lower courts in refusing to probate as his will the instrument that Vasil signed. Since the paper he signed purported to be someone else's will, it was not Vasil's will; thus it lacked testamentary

¹⁵⁰ T. ATKINSON, *supra* note 47, § 58, at 274-75 (footnotes omitted).

¹⁵¹ 52 N.Y.2d 193, 418 N.E.2d 656, 437 N.Y.S.2d 63 (1981).

¹⁵² In addition to the cases cited *infra* notes 154 & 161, see cases collected in 1 PAGE ON WILLS, *supra* note 4, § 13.3 nn.1-2, esp. n.2. Another was recently decided in the Ohio courts, *In re Estate of DiLalla*, No. 39978 (Ohio Ct. App. 8th Dist. Dec. 20, 1979) (relief refused). There is every reason to suppose that this situation occurs more frequently than we know from reported cases. In view of the hostile attitude of the American case law on the question, there has been little incentive to appeal unreported decisions or even to attempt probate in such cases.

¹⁵³ 96 Misc. 2d 513, 409 N.Y.S.2d 204 (1978).

¹⁵⁴ 394 Pa. 564, 148 A.2d 528 (1959).

¹⁵⁵ *Id.* at 565-66, 148 A.2d at 528-29.

intent. Further, "the writing which purported to be his will but was signed by Hellen . . . could not have been probated as Vasil's will, because it was not signed by him at the end thereof" as required by the Pennsylvania Wills Act.¹⁵⁶ "Once a Court starts to ignore or alter or rewrite or make exceptions to clear, plain and unmistakable provisions of the Wills Act in order to accomplish equity and justice in that particular case, the Wills Act will become a meaningless, although well intentioned, scrap of paper, and the door will be opened wide to countless fraudulent claims which the Act successfully bars."¹⁵⁷

This lame argument, that the prevention of fraud required the court to nullify the will even though there was not the least suggestion that any fraud had occurred, was resisted in dissent by Justice Musmanno. He offered, however, an equally suspect argument for validating the will that Vasil signed: "The fact that some of the provisions in the Pavlinko will cannot be executed does not strike down the residuary clause, which is meaningful and stands on its own two feet."¹⁵⁸ Musmanno wanted to disregard the "I, Hellen" language, as well as the initial devise to Vasil (who predeceased himself, as it were), in order to reach and apply the contingent residuary clause "to my [Hellen's] brother, Elias Martin." He would presumably have disregarded the "my brother" language as harmless misdescription. Musmanno reasoned that although the will had been prepared for Hellen, Vasil "did adopt its testamentary provisions as his own."¹⁵⁹ This is quite fallacious, as we can see if we suppose that in the will drafted for Vasil there had been a different residuary devisee from the one in the will drafted for Hellen. In that event it would have been unthinkable to distribute Vasil's estate to Hellen's intended devisee contrary to Vasil's known design. The instrument that Vasil signed would have lacked testamentary intent.¹⁶⁰

Musmanno's result was conceivable on the actual facts of *Pavlinko* on account of the fortuity that the two wills named an identical residuary devisee. That in turn shows us that what Musmanno was really doing was passing Vasil's estate not in accord with the term in Hellen's will, but with the term in the will that had been drafted for him and mistakenly left unexecuted by him.

¹⁵⁶ *Id.* at 566, 148 A.2d at 529.

¹⁵⁷ *Id.* at 571, 148 A.2d at 531.

¹⁵⁸ *Id.* at 575, 148 A.2d at 533 (Musmanno, J., dissenting) (footnote omitted).

¹⁵⁹ *Id.* at 577, 148 A.2d at 534 (Musmanno, J., dissenting).

¹⁶⁰ See *supra* text accompanying notes 71-78.

The will Vasil signed, prepared for Hellen, worked for Vasil only because by happenstance it contained the same term that Vasil wanted and had put in the will that he meant to sign. In truth, therefore, Musmanno was consulting and seeking to enforce the terms of the will that Vasil intended to execute but mistakenly did not. Musmanno wanted to reform the will that Vasil did sign in conformity with the will that Vasil mistakenly left unsigned.

We do not mean to leave the impression that we differ with Musmanno on the outcome in *Pavlinko*. We fault him for trying to smuggle his result in the guise of specious construction; we think he should have admitted and explained the reformation doctrine that he was actually applying. Because Musmanno's stragem does lead to the right result, albeit for an indefensible reason, it has found favor with other courts. In a string of New Zealand-Canadian cases predating *Pavlinko* by a few years (and unknown to Musmanno), the mistakenly executed will was enforced in favor of the shared residuary devisee, with the inapt words of description ordered omitted as mere surplusage.¹⁶¹

In *In re Snide*¹⁶² the New York courts faced a case indistinguishable on its essential facts from *Pavlinko*. Harvey Snide had signed the will prepared for his wife Rose, on account of the error of the lawyer-draftsman who supervised the joint execution ceremony. The first-instance court brushed aside the argument that "strict compliance with" the New York Wills Act¹⁶³ prevented it from remedying "a mistake so obvious."¹⁶⁴ The court granted an application to reform the will, ordering that the words "Harvey," "Rose," and "wife" be substituted for "Rose," "Harvey," and "husband" respectively.

The first-instance court reached its result in *Snide* on general equitable principles, apparently without having understood that in the law of wills reformation has been refused even for a "mistake so obvious." The intermediate appellate court reversed in a memorandum opinion limited to pointing out that the judgment below ignored contrary New York appellate authority.¹⁶⁵

¹⁶¹ *Guardian, Trust & Executors Co. of New Zealand v. Inwood*, [1946] N.Z.L.R. 614, followed in *Re Brander*, [1952] 4 D.L.R. 688, 6 W.W.R. 702 (B.C.), noted in 31 CAN. B. REV. 185 (1953); and *Re Duck*, No. 51005/53 (B.C. 1953), noted in 31 CAN. B. REV. 444 (1953).

¹⁶² 52 N.Y.2d 193, 418 N.E.2d 656, 437 N.Y.S.2d 63 (1981).

¹⁶³ 96 Misc. 2d 513, 514, 409 N.Y.S.2d 204, 205 (Sur. Ct. 1978).

¹⁶⁴ *Id.* at 515, 409 N.Y.S.2d at 206.

¹⁶⁵ 74 A.D.2d 930, 426 N.Y.S.2d 155 (1980).

In 1981, the New York Court of Appeals in turn reversed the appellate division and sustained the power of the first-instance court to reform the will.¹⁶⁶ Unlike the courts in *Taff* and *Engle v. Siegel*, the New York court admitted that it was granting reformation of a will and recognized how strongly that step contravened the former law. Nevertheless, the court advanced no significant justification for its departure. On the question of whether the mistakenly executed instrument possessed testamentary intent, the court endorsed without real explanation (as “more sound”¹⁶⁷ than *Pavlinko* and comparable New York precedents) the New Zealand-Canadian cases that employ the trick attempted by Musmanno in his dissent in *Pavlinko*. The court added cryptically that “we decline the formalistic view that [testamentary] intent attaches irrevocably to the document prepared, rather than the testamentary scheme it reflects.”¹⁶⁸ To say that it is unduly “formalistic” to enforce the mistaken terms rather than the terms that were meant is an epithet rather than a rationale. If the formal requirements of the Wills Act do not constitute the barrier to reformation that prior courts have supposed, it would have been illuminating to say why.

Although the court’s main concern was to limit its decision to this “very unusual case,”¹⁶⁹ the factors that it mentions¹⁷⁰ in order to justify making this exception to the general no-reformation rule that supposedly remains in force are factors that could (and in our view, should) be decisive in other cases of supposed mistake: (1) the high quality of the evidence of the mistake, and (2) the importance of serving the underlying policy of the Wills Act, which is to implement the testator’s true intent.

We think that the “mere exception” rubric of *Snide* is ultimately no more persuasive than the “mere construction” theory in *Taff* and *Engle v. Siegel*. The *Snide* case is, however, a milestone on the path toward a general reformation doctrine, because an

¹⁶⁶ 52 N.Y.2d 193, 418 N.E.2d 656, 437 N.Y.S.2d 63 (1981).

¹⁶⁷ *Id.* at 195, 418 N.E.2d at 657, 437 N.Y.S.2d at 64.

¹⁶⁸ *Id.* at 196, 418 N.E.2d at 657, 437 N.Y.S.2d at 64.

¹⁶⁹ *Id.* at 196, 418 N.E.2d at 658, 437 N.Y.S.2d at 65. The court added: “Nor can we share the fears of the [one dissenting judge] that our holding will be the first step in the exercise of judicial imagination relating to the reformation of wills.” *Id.* at 197, 418 N.E.2d at 658, 437 N.Y.S.2d at 65.

¹⁷⁰ “[W]hat has occurred is so obvious, and what was intended so clear . . .” *Id.* at 196, 418 N.E.2d at 657, 437 N.Y.S.2d at 64. “There is absolutely no danger of fraud, and the refusal to [reform the will] . . . would serve merely to unnecessarily expand formalism, without any corresponding benefit.” *Id.* at 197, 418 N.E.2d at 658, 437 N.Y.S.2d at 65.

Anglo-American court has now expressly acted to grant reformation of a will on the ground of mistake.

These three recent cases underscore the instability of the traditional law of testamentary mistake. In New York there will be pressure to expand *Snide's* "exception"; in California and New Jersey the day must come when the courts are confronted with the Wills Act argument that went unmentioned in *Taff* and *Engle v. Siegel*. So long as the no-reformation rule remains nominally in force, litigants defending future claims based upon *Taff* and *Engle v. Siegel* will object that these were mistake cases in disguise, wrongly decided on account of the failure of the deciding courts to recognize that the no-reformation rule obtains its force from the Wills Act. In part IV of this Article we undertake to explain how and why that argument should be resisted.

IV. OVERCOMING THE PROBLEM OF UNATTESTED LANGUAGE

We now propose to dispute the almost universally accepted argument that the Wills Act attestation requirements dictate the no-reformation rule. This argument achieved its classical formulation in Jarman's nineteenth-century treatise:

[I]t would have been of little avail to require that a will ab origine should be in writing, or to fence a testator round with a guard of attesting witnesses, if, when the written instrument failed to make a full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected, from extrinsic sources. . . .

. . . .

A fortiori parol evidence is not admissible to supply any clause or word which may have been inadvertently omitted by the person drawing or copying the will.¹⁷¹

Adherence to Wills Act formality is, therefore, the premise that leads Jarman to treat as self-evidently irremediable cases in which omitted clauses have been supplied, such as *Taff* and *Engle v. Siegel*. The great weakness of the recent mistake cases is that they ignore this long-entrenched and immensely influential argument. The no-reformation rule rests on the view that the courts cannot supply missing language, because the language to be supplied has not been written down, signed, and attested as required by the Wills Act. Reformation would require the validation of unattested language.¹⁷²

¹⁷¹ 1 T. JARMAN, A TREATISE ON WILLS 349b-52 (J.C. Perkins ed.) (1st Am. ed. Boston 1845).

¹⁷² See *supra* note 27 and text accompanying notes 26-27.

In section A below we point the way to a theory that would allow reformation to confer the imprimatur of compliance upon language that must be supplied in order to remedy a mistaken omission or to correct a mistaken term in a will that has been otherwise executed in compliance with the formal requirements of the Wills Act. This compliance-type theory is derived from the practice of the courts in the most analogous area of private law, namely, cases in which language has been mistakenly omitted from or mistakenly rendered in an instrument that must comply with the formal requirements of the Statute of Frauds.

We discuss in section B a second theory, also with an ample common law pedigree, that could be employed in many mistake cases in order to overcome the unattested language problem. We call this theory "remedying wrongdoing"; we derive it from the quite similar notion that has been developed in constructive trust cases. Where the mistake that has affected the will has been the product of a wrong, for example the negligence of the lawyer-draftsman, the constructive trust cases provide by way of analogy an independent basis for reformation: preventing harm to the innocent victim of third-party wrongdoing.

A. Compliance Theory: Analogizing from Practice under the Statute of Frauds

Just as the no-reformation rule has been justified on the ground that a contrary practice would allow oral wills in violation of the Wills Act attestation requirements, the so-called "oral contract" argument has been made respecting the Statute of Frauds. The Statute is argued to be violated when oral evidence is adduced to show that an instrument subject to the Statute contains a mistaken term or lacks a term that was intended.

In his notable article, *Reformation and the Statute of Frauds*,¹⁷³ George Palmer showed why the "oral contract" argument was fallacious and not a barrier to reforming the instrument. The parties' attempt to express their transaction in writing is also an attempt to express in writing the deficient or omitted term. From the standpoint of the purposes of the formal requirements of the Statute of Frauds, there is a considerable difference between noncompliance and defective compliance. The cautionary and evidentiary purposes of the Statute of Frauds are largely achieved in the attempt at

¹⁷³ 65 MICH. L. REV. 421 (1967).

due execution.¹⁷⁴ The object of reformation in these cases is not to enforce an oral transaction, but to make a written transaction conform to the true understanding of the parties. "To say that reformation amounts to enforcement of the oral agreement overlooks the significance of . . . the *act* of the parties by which they sought to turn the oral understanding into a legally enforceable agreement through expression in the writing. In the view of most judges, equity performs a proper role when it corrects the consequences of mistake so as to make the situation correspond, not merely to what the parties intended, but to what they also *attempted* to effectuate."¹⁷⁵ The safeguard that prevents reformation from being abused—for example, by being employed to interpolate a spurious term—is the ancient requirement of an exceptionally high standard of proof in reformation cases. Palmer's conclusion, for which he adduces considerable support in the case law, is that the Statute of Frauds "should not prevent reformation in any case in which it is found *by clear and convincing evidence* that through mistake a writing fails to express the terms [that] the parties to an agreement intended to express in the writing."¹⁷⁶

In a companion article,¹⁷⁷ Palmer demonstrates that the parol evidence rule, properly understood, does not hinder the trier from consulting extrinsic evidence in these cases. Following Wigmore, Corbin, and much modern authority, Palmer shows that the so-called integration doctrine limits application of the parol evidence rule to cases in which "the writing was intended to be a complete and accurate embodiment of the agreement."¹⁷⁸ Hence, "[t]he parol evidence rule of itself is never an obstacle to reformation, provided there is satisfactory evidence of a mistake in integration."¹⁷⁹ Once again, it is the heavy burden of proof according to a clear-and-convincing-evidence requirement that is the real safeguard against fraud and other abuse, rather than the categorical denial of relief.¹⁸⁰

We think that Palmer's analysis applies with full cogency to the Wills Act. The two factors that distinguish practice under the Wills Act from that under the Statute of Frauds cut in opposite

¹⁷⁴ See *supra* notes 7 & 27.

¹⁷⁵ Palmer, *supra* note 173, at 423 (emphasis in original) (footnote omitted).

¹⁷⁶ *Id.* 440 (emphasis added).

¹⁷⁷ Palmer, *Reformation and the Parol Evidence Rule*, 65 MICH. L. REV. 833 (1967).

¹⁷⁸ *Id.* 835 (footnote omitted).

¹⁷⁹ *Id.* 833 (footnote omitted).

¹⁸⁰ *Id.* 838.

directions and largely cancel each other. First, the problem of evaluating extrinsic evidence in a testamentary setting may in the aggregate be harder under the Wills Act than under the Statute of Frauds, because the testator is always dead and unable to "give his version of the matter" ¹⁸¹ Nevertheless, as we pointed out in part I, reformation is granted in cases of inter vivos transfers even when the donor is dead.¹⁸² Second, the contrary factor that makes relief easier under the Wills Act is the subjective standard of the law of testation. Because a will is a unilateral transaction, it is in general much more susceptible to illumination by extrinsic evidence of its author's intent than is a contract, where "the fair expectation of the other party has to be given effect." ¹⁸³

Transposed to the setting of the Wills Act, Palmer's analysis highlights the difference between an oral will and the use of oral or other extrinsic evidence in order to correct or to supply a term in a duly executed will. Whereas an oral will instances total noncompliance with the Wills Act formalities, a duly executed will with a mistakenly rendered term involves high levels of compliance with both the letter and the purpose of the Wills Act formalities. To the extent that a mistake case risks impairing any policy of the Wills Act, it is the evidentiary policy that is in question.¹⁸⁴ But, as Palmer points out, the decisive feature of the law of reformation in the inter vivos transfer cases has been its alternative evidentiary safeguard, the requirement of an exceptionally high standard of proof. A modern reformation doctrine for the law of wills will certainly adhere to this clear-and-convincing-evidence standard.

A substantially identical analysis appeared in 1973 in a report to the Lord Chancellor by England's official Law Reform Committee. The committee found itself unable to identify tenable reasons "why the equitable doctrine of rectification [the English term for reformation] does not apply to wills." ¹⁸⁵ It dismissed the unat-

¹⁸¹ *Bowerman v. Burris*, 138 Tenn. 220, 222, 197 S.W. 490, 492 (1917).

¹⁸² See *supra* text accompanying notes 12-18.

¹⁸³ Chafee, *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381, 399 (1941), citing Learned Hand's remark that in contract "[i]t makes not the slightest difference whether a promisor actually intends that meaning which the law will impose upon his words." *Eustis Mining Co. v. Beer, Sondheimer & Co.*, 239 F. 976, 984 (S.D.N.Y. 1917). This distinction between bilateral and unilateral transfers is a main theme in the German literature devoted to explaining and justifying the liberal relief against mistake in wills characteristic of German (and other Continental) law. See, e.g., T. KIPP & H. CONIG, *supra* note 24, at 162.

¹⁸⁴ See *supra* note 27.

¹⁸⁵ LAW REFORM COMMITTEE, *supra* note 59, at 5.

tested language argument on the ground that "in the case of other documents the doctrine of rectification applies even though statute requires them to be in a particular form, for example, under seal; and evidence of what words a will was intended to contain may fall far short of general evidence of the testator's dispositive intention."¹⁸⁶ In other words, relief against mistake does not augur the enforcement of oral wills. Courts do and should distinguish between noncompliance with formal requirements and the extensive compliance characteristic of mistake cases. The Committee also echoes Palmer in trusting for safeguard to the higher standard of proof already developed in the law of rectification for inter vivos instruments.¹⁸⁷

Although the present Article affords no occasion to review the nascent movement in Australia and elsewhere towards a substantial compliance doctrine for inconsequential Wills Act execution blunders,¹⁸⁸ the point should be made that the relief against mistaken terms that we favor is usually easier to reconcile with the policies of the Wills Act than is the relief against mistaken execution now being developed under the substantial compliance doctrine. In the typical case of mistaken terms, there has been due execution and the issue is the meaning or completeness of a single disputed term. In such circumstances the finality of the testator's intent is not in question; and the protective and evidentiary policies of the Wills Act¹⁸⁹ have been fully served for all save the disputed term.

¹⁸⁶ *Id.* 6.

¹⁸⁷ [A] mere balance of probabilities is not enough, and . . . the evidence must be of the clearest and most satisfying description, leaving no fair or reasonable doubt. . . . We do not think that any standard of proof lower than this ought to suffice in the case of a will, but on the other hand we do not think that there is any need to prescribe a higher standard.

Id. 10-11.

¹⁸⁸ For discussion of developments in South Australia and Israel, see Langbein, *Defects of Form in the Execution of Wills: Australian and Other Experience with the Substantial Compliance Doctrine*, in AMERICAN BAR ASSOCIATION, AMERICAN/AUSTRALIAN/NEW ZEALAND LAW: PARALLELS AND CONTRASTS 59 (1980); Langbein, *Crumbling of the Wills Act: Australians Point the Way*, 65 A.B.A.J. 1192 (1979). In October 1981, the Australian state of Queensland enacted the most recent substantial compliance statute: "the Court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this [Wills Act] if the Court is satisfied that the instrument expresses the testamentary intention of the testator" Succession Act § 9(a), 1981 Queensl. Stat. No. 69. In addition to the statutes discussed in these sources, legislation has been proposed in the province of British Columbia. LAW REFORM COMMISSION OF BRITISH COLUMBIA, WORKING PAPER NO. 28: THE MAKING AND REVOCATION OF WILLS 67-68 (1980).

¹⁸⁹ See *supra* note 27.

Furthermore, the mistaken term cases are distinguished by the quality of the testator's conduct: Whereas Wills Act execution blunders are ordinarily the work of laymen attempting homedrawn wills, in the mistaken term cases the testator has typically sought out, paid for, and relied upon the work of counsel. In each of the three recent cases discussed in part III, for example, a lawyer's blunder was responsible for the mistake. To frustrate the wishes of a testator who had the prudence to follow counsel's direction seems especially offensive if it is avoidable. Since testators cannot be expected to discover their lawyers' mistakes, the question is whether to charge them with such mistakes when the evidence clearly establishes what was really wanted. We think it palpable that in these circumstances the testator's intent should be implemented if it can be proved with appropriate certainty.

*B. Remedying Wrongdoing: Enforcing Unattested Intention
in Open Disregard of the Wills Act*

It is well established that when a devisee or an heir commits a wrong—by fraud, undue influence, or duress—in procuring his devise or in preventing disinheritance, a court of equity will prevent the wrongdoer from benefiting.¹⁹⁰ Further, when the act of wrongdoing deprives an intended beneficiary of a devise or an inheritance, the court can impose a constructive trust in his favor.¹⁹¹ Palmer's treatise on restitution gives a succinct account of the leading case, *Dixon v. Olmius*,¹⁹² which has been followed for nearly two centuries:

[A] bill in equity alleged that a decedent intended to re-execute a will which had been revoked, but was prevented from doing so by several acts of fraud and violence on the part of the heir, or at least of her husband, who would not permit an attorney sent for by the decedent to go into his bedroom. Lord Thurlow held that this stated a case for equitable relief against the heir in favor of the legatees under the revoked will. Today, the decree would be that the heir is a constructive trustee for the intended

¹⁹⁰ See generally 4 G. PALMER, *supra* note 1, §§ 20.2-5. Homicide also is a ground for preventing the slayer from succeeding to his victim's property. See *id.* §§ 20.8-16.

¹⁹¹ *Id.* §§ 20.3 (wrongfully preventing the making of a devise), 20.4 (wrongfully preventing the revocation of a devise).

¹⁹² 1 Cox Eq. 414, 29 Eng. Rep. 1227 (1787).

legatees, and the title either would be vested in them by the decree or the heir would be ordered to transfer his title to them. An important aspect of the case is that the court was prepared to hold the heir as constructive trustee, even though she was the innocent beneficiary of the wrongful acts of her husband.¹⁹³

The willingness of the courts to intervene in these cases invites comparison with the two policies on which the general no-reformation rule rests: the potential unreliability of the extrinsic evidence, and the need for adherence to Wills Act formality.

When a will is alleged to have been affected by wrongdoing, both the fact of the wrongful act and the identity of the wrongfully deprived beneficiary must be proved by extrinsic evidence. This evidence is of the same character and inherent untrustworthiness as the evidence that would be required under a general reformation doctrine of the sort we advocate. Palmer explains: "The danger that effect may be given to fraudulent or mistaken testimony is still present, but it is overbalanced by the policy against permitting retention of a benefit obtained as a result of a wrongful act."¹⁹⁴ This result is hardly surprising, in view of our discussion in part II, where we showed how often the courts receive and act upon extrinsic evidence of the same inherently dangerous type, even without the spur of correcting wrongdoing, when the situation is one that can be remedied simply by denying effect to the attested language.¹⁹⁵

When a constructive trust is imposed on a wrongdoer, however, and when it is imposed in favor of the intended and wrongfully deprived beneficiary, the courts are ordering that the decedent's property be transferred to a person who was not designated to take it in a validly executed will. This is the step that under traditional law the courts will not take where the testator's unilateral mistake is what deprived the beneficiary of his devise. The reason is that such a step would, according to the conventional understanding that we have just been criticizing in section A above, violate the requirement of Wills Act formality. Consequently, it is more accurate to say that what is really overbalanced by the policy against permitting retention of a benefit obtained as a result of a wrongful act is less the danger of fraudulent or mistaken testimony than the

¹⁹³ 4 G. PALMER, *supra* note 1, § 20.3, at 190.

¹⁹⁴ *Id.* § 20.1, at 158.

¹⁹⁵ See *supra* text accompanying notes 26-70.

need for technical adherence to the requirements of the Wills Act.¹⁹⁶ The constructive trust mechanism conceals this point somewhat, since it enables a court to pay lip service to Wills Act formality. The property passes to the wrongdoer pursuant to the tainted instrument that was executed with Wills Act formality; equity then acts in personam against the wrongdoer, declaring him trustee *ex maleficio* and ordering him to transfer the property to the beneficiary whom the testator would have intended to take but for the wrong.¹⁹⁷ Of course, the end result is that the court enforces the testator's true intent in preference to the literal terms of his will; but through the minuet of the constructive trust the court can pretend that this result achieves technical compliance with the Wills Act.

In order to appreciate the significance of what the courts are doing by means of constructive trust in these cases, it is important to observe that the policy against preventing a wrongdoer from profiting by his own wrong could be served in a more limited way that would be much more faithful to the supposed virtue of Wills Act obeisance. Rather than impose the constructive trust for the benefit of the intended beneficiary who was not named in the will, the constructive trust could be imposed for the benefit of the testator's estate, coupled with the direction that the estate pass as though the wrongdoer had predeceased the testator and the wrongdoer's interest in the estate had lapsed.¹⁹⁸ Under such a decree, the estate would pass entirely to the remaining beneficiaries (the innocent devisees named in the will, or in the event of partial or total intestacy, the innocent heirs). The court's only tampering with the attested instrument would be by way of deletion, on the familiar ground that a nominal devise tainted by wrongdoer's conduct lacks testamentary intent.¹⁹⁹

Why have the courts not followed this less adventurous path, which we might call the "mere deletion" approach? The answer, which is well understood in the case law and the literature, is that mere deletion would still leave unjust enrichment unremedied.

¹⁹⁶ Likewise, in a case in which wrongful conduct taints a transfer of real property, the courts are quick to impose a constructive trust or other remedy. Correcting wrongdoing overbalances the value of literal adherence to the formal requirements of the Statute of Frauds. See 4 G. PALMER, *supra* note 1, § 19.3, esp. at 107-108.

¹⁹⁷ The classic American case is *Trustees of Amherst College v. Ritch*, 151 N.Y. 282, 324-25, 45 N.E. 876, 887 (1897).

¹⁹⁸ But cf. 4 G. PALMER, *supra* note 1, § 20.6, at 217-18.

¹⁹⁹ See *supra* text accompanying notes 71-76. See generally 1 PAGE ON WILLS, *supra* note 4, §§ 14.3-8.

Although it would effectively deny the wrongdoer his spoils, it would allow his wrongful act to result in a benefit for the remaining innocent beneficiaries at the expense of the intended beneficiary. The courts have preferred the rule that a constructive trust action lies even against innocent beneficiaries, in order that they not be unjustly enriched at the expense of the intended beneficiary on account of the wrongdoer's conduct.²⁰⁰

Accordingly, it is safe to say that in the constructive trust cases the courts have determined that the policy of correcting unjust enrichment resulting from wrongdoing prevails against the policy of literal adherence to Wills Act formality. If this principle were extended from the cases of intentional wrongdoing, where it is now entrenched, to cases of negligent wrongdoing, it could supply the theory for relief in many of the most egregious mistake cases that under traditional law go unremedied.

The concept of what constitutes a wrong remediable by constructive trust in the law of wills already extends beyond acts of force and fraud to simple breach of promise. The situation in the so-called secret testamentary trust cases is this: The testator's will by terms devises property to a particular devisee outright. After the testator's death a plaintiff alleges that the named devisee had promised the testator that the devisee would hold the property for the benefit of the plaintiff. When the promise is proved,²⁰¹ whether it was made before or after the will was executed,²⁰² most jurisdictions enforce a constructive trust on the devisee in favor of the plaintiff.²⁰³ In administering this doctrine, the full range of extrinsic evidence is admissible, including the testator's direct declarations of intent.²⁰⁴ The suspicious nature of such evidence is rec-

²⁰⁰ See 4 G. PALMER, *supra* note 1, § 20.17.

²⁰¹ Since the promise need not be supported by consideration, these cases are to be distinguished from standard will contract cases. Furthermore, the promise need not be explicit. The promise has been implied in cases where the legatee silently acquiesced in the testator's directions as to the distribution of the property bequeathed to the legatee. *E.g.*, *Barron v. Stuart*, 136 Ark. 481, 207 S.W. 22 (1918); *Olsen v. First Nat'l Bank*, 76 S.D. 605, 83 N.W.2d 842 (1957).

²⁰² See 4 G. PALMER, *supra* note 1, § 20.6, at 209-10; 1 A. SCOTT, *THE LAW OF TRUSTS* § 55.2, at 428-29 (3d ed. 1967).

²⁰³ *Trustees of Amherst College v. Ritch*, 151 N.Y. 282, 323-25, 45 N.E. 876, 887 (1897); see also *RESTATEMENT OF RESTITUTION* § 186 (1937); *RESTATEMENT (SECOND) OF TRUSTS* § 55 (1959); G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* §§ 499, 501 (2d ed. 1960); 4 G. PALMER, *supra* note 1, § 20.6; 1 A. SCOTT, *supra* note 202, §§ 55-55.7. There is a minority view that permits the named devisee to retain the devise. 4 G. PALMER, *supra* note 1, § 20.6(f).

²⁰⁴ *E.g.*, *Barron v. Stuart*, 136 Ark. 481, 487, 207 S.W. 22, 23 (1918); *Calloway v. Smith*, 300 Ky. 55, 56-57, 186 S.W.2d 642, 642-43 (1945); *Strype v. Lewis*, 352

ognized by requiring that the the devisee's promise be shown by clear-and-convincing evidence.²⁰⁵

There is no denying that imposing the constructive trust in favor of the plaintiff on the ground that he was the beneficiary that the testator intended but did not mention in the will enforces unattested intention in disregard of the Wills Act. In their treatises, Scott and Bogert argue that in the secret testamentary trust cases the constructive trust ought to be imposed in favor of the testator's estate rather than in favor of the intended beneficiary, because the existing practice is inconsistent with the Wills Act.²⁰⁶ But the courts understand that they are acting in disregard of the Wills Act,²⁰⁷ which is precisely the point we wish to make. As we have so often emphasized, the courts are prepared to enforce the testator's true intent even though it is unattested and must be proved by extrinsic evidence of an inherently suspect nature, so long as (1) the evidence of intent meets the clear-and-convincing-evidence standard, and (2) there is a pretext for disregarding the Wills Act, a pretext supplied in this instance by the devisee's promise.²⁰⁸

The courts often emphasize in these secret testamentary trust cases that the testator died believing that his intention, though unexpressed in the will, would be carried out—that the devisee's promise would be honored. As an early English court said, the testator died "in peace upon the . . . promise."²⁰⁹ This factor explains not only why it would be unjust enrichment to allow the devisee to keep the property but also why it would be unjust enrichment to allow the property to go to the testator's estate and from there to his residuary devisees or heirs: The unjustness consists in thwarting the testator's intent. This raises the question why the same reasoning does not apply to cases of mistake. The answer is

Mo. 1004, 1012, 180 S.W.2d 688, 692-93 (1944); *Riseley v. Kirkman*, 56 N.J. 464, 466-69, 267 A.2d 50, 51-53 (1970); *Tuescher v. Gragg*, 136 Okla. 129, 133, 276 P. 753, 757-59 (1929).

²⁰⁵ *E.g.*, *Barron v. Stuart*, 136 Ark. 481, 489, 207 S.W. 22, 24 (1918); *Kramer v. Freedman*, 272 So. 2d 195, 198 (Fla. Dist. Ct. App. 1973); *Corbin v. Corbin*, 292 Ky. 545, 166 S.W.2d 826 (1942); *Strype v. Lewis*, 352 Mo. 1004, 1012, 180 S.W.2d 688, 693 (1944); *Teuscher v. Gragg*, 136 Okla. 129, 133, 276 P. 753, 757 (1929); *Hollis v. Hollis*, 254 Pa. 90, 95, 98 A. 789, 790 (1916).

²⁰⁶ G. BOGERT, *supra* note 203, § 501; 1 A. SCOTT, *supra* note 202, §§ 55.1, 55.9, at 423-26, 450-51.

²⁰⁷ *E.g.*, *Trustees of Amherst College v. Ritch*, 151 N.Y. 282, 324-25, 45 N.E. 876, 887 (1897).

²⁰⁸ *Id.* at 323, 45 N.E. at 887 where the court acknowledged that "the trust springs from the intention of the testator and the [wrong] of the legatee."

²⁰⁹ *Chamberlaine v. Chamberlaine*, 2 Freeman 34, 22 Eng. Rep. 1041 (1678).

that it should, except that as conventionally perceived some action on the part of a third party that can be deemed wrongful is required for the courts to feel justified in disregarding the Wills Act. In a case of simple mistake there is no third party engaged in intentional wrongdoing.²¹⁰

We think that the "remedying-wrongdoing" rationale in the constructive trust cases should apply to those mistake cases in which the mistake results from the poor draftsmanship of a lawyer (or other scrivener), as in cases like *Taff* and *Engle v. Siegel*; or from his negligent supervision of clerical work, or of the execution process in cases like *Paulinko* and *Snide*. The courts have shown themselves able to overcome the evidentiary difficulties in the constructive trust cases. If the lawyer's wrong in a mistake case is not corrected, an unintended beneficiary is unjustly enriched at the expense of the intended taker.²¹¹ To be sure, the constructive

²¹⁰ If the intended beneficiary of a secret testamentary trust is entitled to have a constructive trust imposed in his favor, it would be expected that the intended beneficiary of a so-called partially secret testamentary trust would be similarly entitled. In a partially secret testamentary trust, the devise expressly declares that the devisee is to take for the benefit of another, but the devise fails to name the intended beneficiary; after the testator's death, extrinsic evidence is introduced to show for whom the devisee promised to hold the property. If the promise and the identity of the intended beneficiary can be shown by clear-and-convincing evidence, the same elements that lead the courts in the secret testamentary trust cases to enforce unattested intention in open disregard of the Wills Act are present. The promise was made and the testator died in peace upon the promise. The claim of the intended beneficiary is superior not only to that of the named devisee but also to that of the testator's residuary devisees or heirs. The latter, though innocent of any wrongdoing, would be unjustly enriched as a result of the wrong of another. There is substantial authority supporting this line of reasoning. The leading decision is *Curdy v. Berton*, 79 Cal. 420, 21 P. 858 (1889). *Accord*, RESTATEMENT (SECOND) OF TRUSTS § 55 comment h (1959). Other cases are collected in 4 G. PALMER, *supra* note 1, § 20.7(b). The existence of a promise on the part of the devisee is of course essential. *Bryan v. Bigelow*, 77 Conn. 604, 60 A. 266 (1905). There are, however, some contrary cases, of which the best known are *Olliffe v. Wells*, 130 Mass. 221 (1881), and *Reynolds v. Reynolds*, 224 N.Y. 429, 121 N.E. 61 (1918); others are collected in 4 G. PALMER, *supra* note 1, § 20.7(a). These decisions that reject the claim of the intended beneficiary on the ground of fidelity to the Wills Act fail to appreciate that the true rationale of the secret testamentary trust cases is that the devisee's wrongful conduct justifies disregarding the Wills Act. Since there is wrongful conduct of the same quality in both the secret and partially secret testamentary trust cases, enforcing unattested intention in disregard of the Wills Act should be justified in both cases.

In many, though not all, of the partially secret trust cases, the legatee did not actually breach his promise and in fact sought to be allowed to carry it out. As Palmer points out, however, the rights of the intended beneficiary "are to be measured by the rights he would have if the trustee repudiated his obligation . . ." *Id.* § 20.7, at 229.

²¹¹ 1 G. PALMER, *supra* note 1, § 1.7, at 44. See also 4 *id.* § 20.1, at 158 (footnote omitted), where the author points out that "[I]t is not self-evident that [constructive trust] . . . relief should be refused when . . . enrichment is the result of

trust cases that arise in circumstances of fraud and force can be distinguished, because the lawyer's wrongful conduct in the mistake case is negligent rather than intentional. Likewise, the secret testamentary trust cases where constructive trust relief is granted can be distinguished, since the lawyer's deficient performance breaches his contract of service through negligence rather than design. But the distinction between intentional and negligent wrongdoing seems misplaced as a ground for denying relief in these mistake cases. A wrong is a wrong; and in the mistake cases the testator's reliance is more worthy of relief than in most of the cases where remedy is now granted, because he sought out and followed the advice of counsel.

V. THE REFORMATION DOCTRINE

The impulse to relieve against mistake is strongly felt in modern courts, as the *Taff*, *Engle v. Siegel*, and *Snide* cases illustrate. Yet because the black letter law has seemed so hostile, courts have often given remedy in specious or unreasoned theories of decision. We think that with the no-extrinsic-evidence rule now undergoing abrogation and with the Wills Act formal requirements understood to be not an obstacle, a principled reformation doctrine can be formulated that will strike the proper balance between the concerns that underlie the old no-reformation rule and the factors that have made that rule ever more unpalatable.

A. *The Elements of the Doctrine*

The reformation doctrine will exhibit considerable simplicity. The three elements of the doctrine are already to be observed in the various situations where courts have been able to remedy mistake without affronting older notions of the force of the Wills Act. These elements, also implicit in the recent mistake cases canvassed in part III, we label the (1) materiality, (2) particularity, and (3) burden-of-proof requirements. Each is directly responsive to the evidentiary concerns that were so prominent in discussions of the old no-reformation rule.²¹²

mistake, for arguably this should be enough to outweigh the policies underlying the statute of wills."

²¹² The no-reformation rule bred an interest in schemes of classification. Mistake cases were grouped in categories of inducement, expression, omission, execution, revocation, law/fact, and so forth. These categories helped in the manipulation of the line between construction and mistake, and they may remain useful for organizing fact patterns and collecting cases, but there is no reason for an explicit reformation rule to perpetuate such refinements at the level of doctrine. Henderson, *supra* note 47, is the leading classifying work, and it collects the earlier literature.

1. Materiality

As with other remedial doctrines in the law of wills, for example the fraud and undue influence rules,²¹³ the reformation doctrine will require that the error be shown to have affected specific terms in the will. Materiality is usually self-evident in the proofs that establish the mistake, as in *Taff*, *Engle v. Siegel*, and *Snide*, where the effect of the errors on the respective residuary devises was not seriously controverted. But cases can be found in which materiality is lacking even though mistake be proved, for example, the old Rhode Island case, *Gifford v. Dyer*, where the court found it "very apparent . . . that the testatrix would have made the same will, had she known" that she was mistaken in thinking her son dead.²¹⁴

In cases of fraud and undue influence, materiality is usually presumed on account of the wrongdoer's conduct; the burden is shifted to him to disprove it, which he can virtually never do. In ordinary mistake cases, where the element of intentional wrongdoing against the testator is lacking, the burden of proving materiality remains on the proponent of a mistake claim.

2. Particularity

Implicit in the requirement of an exceptionally high standard of proof is the threshold requirement that a mistake claim be sufficiently circumscribed to be susceptible of proof. The contention that "if only my aunt had understood how much I loved her, she'd have left me more," will not suffice to transform disappointment into mistake. Such a claim would require that much of the detail of a decedent's life be examined, and the problems of proof would still be insurmountable. Accordingly, the reformation doctrine will confine relief to situations where the alleged mistake involves a fact or event of particularity—for example, in *Taff* the scrivener's misunderstanding of the import of the term "heirs"; in *Engle v. Siegel* the scrivener's failure to provide a lapse clause appropriate to the testators' wishes; in *Snide*, the mistaken execution of the spouse's will pursuant to the lawyer's direction.

3. Burden of Proof

The essential safeguard for a reformation doctrine in the law of wills is a standard of proof effective to deal with the evidentiary

²¹³ E.g., T. ATKINSON, *supra* note 47, §§ 55-56, at 260-61, 266-69.

²¹⁴ *Gifford v. Dyer*, 2 R.I. 99, 102 (1852).

concerns to which the former no-reformation rule was addressed. Although that rule has been found too harsh, it did respond to the difficulty and the danger of proving that a testator now dead made a mistake in his duly executed will. We have said that a modern reformation doctrine for wills must follow the law of non-probate transfers by placing upon the proponent of a mistake claim the burden of proving it by evidence of exceptional quality. The clear-and-convincing-evidence standard is pitched above the ordinary preponderance-of-the-evidence test characteristic of most civil litigation, but below the beyond-reasonable-doubt rule of the criminal law.²¹⁵

In *Taff* and *Engle v. Siegel*, where the no-reformation rule was avoided by pretending that they were "mere construction" cases, the appropriate clear-and-convincing-evidence standard was not articulated. Even if the evidence in those cases met that standard, it was not so tested. One of the greatest advantages of recognizing an explicit reformation doctrine is that the pressure to conceal reformation as mere construction should largely vanish. When mistake cases can be admitted for what they are, they can be held to the higher standard of proof appropriate to them.

Paradoxically, therefore, abandonment of the no-reformation rule will sometimes result in greater fidelity to those evidentiary concerns that prompted the no-reformation rule. Experience has shown that the evidentiary policies of the no-reformation rule are better served under the opposite rule.

4. Relation to Statutory Rules of Construction

In *Engle v. Siegel*, one judge filed a dissenting opinion.²¹⁶ He pointed to the language of the New Jersey gap-filling statute dealing with lapsed residuary devises, which appoints the remaining residuary devisees as substitute takers "unless a contrary intention shall appear by the will" ²¹⁷ The dissenter thought that this proviso defeated the application of New Jersey's surreptitious reformation doctrine.

The question that the dissenter raised in *Engle v. Siegel* would recur in any jurisdiction that adopted an honest reformation doc-

²¹⁵ The sphere of the present law of wills in which the clear-and-convincing evidence test is most commonly applied is the claim of contract to make a will. Most states have authority on the point, which is conveniently collected in the American Digest System under key number "Wills 58(2)."

²¹⁶ 74 N.J. at 297, 377 A.2d at 897.

²¹⁷ N.J. STAT. ANN. § 3A:3-14 (West 1951) (current version at N.J. STAT. ANN. § 3A:2A-25 (West Supp. 1980)), cited in 74 N.J. at 298-99, 377 A.2d at 898.

trine, because every state probate code has numerous statutory rules of construction that, like the quoted New Jersey statute, purport to govern when the will is silent. The question is whether these statutory gap-filling rules take precedence over reformation in a well-proven case of mistake. The answer is no, and the reason is straightforward, even though the language of such a statute often gives seeming plausibility to the opposite view. Since the statute typically requires contraindication "in the will,"²¹⁸ it is mechanically correct to observe that a mistakenly omitted term is not "in the will." But the reason why such statutes should not bar application of the reformation doctrine is clear: The theory of a well-proven reformation case is that language mistakenly omitted from the will is being restored to the place in the will where it was intended to be. Because reformation puts the language back in the will, there is no gap for the gap-filling statutes to fill. Reformation is based upon the testator's actual intent and his actual language, whereas a statutory rule of construction is a device of subsidiary rank, tailored in one size for all silent testators.

B. *Scope of the Doctrine*

We wish to put some testing cases that should help to illustrate how the three elements of the reformation doctrine respond to certain characteristic concerns.

1. Materiality: Failure to Make or Revise a Will

Under the reformation doctrine the most problematic cases of supposed mistake are quite beyond remedy, and hence beyond litigation. Reformation presupposes that there be a valid will capable of being reformed. Consider the rudimentary example of an attempted oral will: Uncle meant to leave his estate to Niece, mistakenly thinking that he could effect his intent merely by declaring it to Niece, which he did. Thereafter Uncle died intestate, leaving his sibling, Sister, as his sole heir. Because Uncle did not reduce his testamentary intent to writing and execute it as required by the Wills Act, Niece cannot invoke the reformation doctrine to implement Uncle's true intent. There is nothing to reform. Like-

²¹⁸ E.g., UNIFORM PROBATE CODE §§ 2-301, 2-508, 2-511, 2-603. Since all such statutes predate the reformation doctrine, it is easy to understand why none attempts to harmonize expressions like "in the will" with the possibility of reformation for mistaken terms.

wise, although Sister was enriched at the expense of Niece and in a sense unjustly, as a result of Uncle's mistake, Niece cannot obtain relief by way of constructive trust (apart, of course, from additional facts that would establish that Uncle's mistake was induced by third-party wrongdoing). If the rule were otherwise, and either reformation or constructive trust were used to remedy the mistake of failing to make a will, the Wills Act would be nearly bereft of force, despite the central importance that the legislature and the courts have attached to the evidentiary and cautionary policies of the Wills Act.²¹⁹

The reformation remedy also presupposes that the mistake in question has occurred or persisted contemporaneously with the making of the will, as opposed to happening subsequently. Thus, in our example, if Uncle had a validly executed will that devised his estate to Sister, and he thereafter formed an intent to alter the disposition in favor of Niece in the mistaken belief that he could substitute his new intent by communicating it to Niece orally, his declaration to Niece would not found a reformation action. Although in this case an instrument exists that could be reformed merely by substituting "Niece" for "Sister," the remedy does not lie because Uncle's will was not the product of Uncle's mistake. The will when executed stated Uncle's intent accurately. The mistake was not material to the will. Uncle's mistake was his subsequent failure to execute a codicil or a new will to carry out his new intent, and this is an uncorrectable mistake of the same sort as a testator's failure to make a valid will in the first place.

2. Particularity: Distinguishing Testator's Intent from Testator's Language

In the prototypical case of clerical error where the case for a reformation remedy is so compelling, terms deleted or garbled by a typist would be rendered as the testator intended. Occasionally, the testator himself will have drafted the terms affected by the mistake, and the reformation decree will thereby give effect to the testator's own language. More commonly, the language of a will is the testator's only by adoption; he forms an intention that he communicates to his lawyer, and he relies upon the lawyer to draft the appropriate language. Suppose Uncle asks Lawyer to draft a will devising Blackacre to Niece, but Lawyer misdescribes the

²¹⁹ See *supra* note 27.

property so that the will devises Greenacre.²²⁰ Does it matter that the words needing reformation were composed by Lawyer rather than Uncle? In the law of nonprobate transfers, reformation lies without regard to whether the mistaken words were formulated by the donor or his lawyer,²²¹ and we think that the logic of that solution is inescapable. Were the rule otherwise, reformation would be unavailable even in cases of pure clerical error, when (as is usual) the terms that the typist has deleted or garbled have been formulated by the lawyer rather than the testator. The law of reformation must require particularity of testator's intent, but not necessarily testator's language.

It follows, we think, that mistakes of law and lawyering as well as mistakes of fact should be remediable. Nothing of principle turns on the distinction that in a case like *Taff* the lawyer's mistake involved misapprehension of the meaning of a term such as "heirs," whereas in another case the lawyer has misrendered a name or a sum.²²² In either case the lawyer's mistake prevented

²²⁰ That the testator has read over the will before executing it should not stand in the way of reformation. The English Law Reform Committee reached the same conclusion:

We have also considered whether any special significance ought to be given to cases in which the will has been read over to the testator, perhaps with explanations, and expressly approved by him before execution. In our view it should not. Some testators are inattentive, some find it difficult to understand what their solicitors say and do not like to confess it, and some make little or no attempt to understand. As long as they are assured that the words used carry out their instructions, they are content. Others may follow every word with meticulous attention. It is impossible to generalise, and our view is that reading over is one of the many factors to which the court should pay attention, but that it should have no conclusive effect.

LAW REFORM COMMITTEE, *supra* note 59, at 12.

²²¹ *E.g.*, *Flitcroft v. Commissioner*, 328 F.2d 449 (9th Cir. 1964); *Berger v. United States*, 487 F. Supp. 49 (W.D. Pa. 1980).

²²² The English Law Reform Committee groped for such distinctions without success. It proposed allowing reformation for clerical errors and in cases where the lawyer "drafts the will in terms which do not carry out the instructions which the testator gave," but not in cases in which the testator fails "to appreciate the effect of the words used" LAW REFORM COMMITTEE, *supra* note 59, at 8-9. This last restriction was suggested in order that the court not have "to pass into the wider realm of the testator's purpose." *Id.* 10. Yet the effect of the restriction would be to forbid relief in so palpable a mistake case as *Taff*. The Committee was surely correct to think that most imaginable claims of mistaken purport would not be adequately provable, but surely wrong to want to generalize that point as doctrine with the result that the claim would be forbidden in a case like *Taff*.

The English committee split 8-5 on the question of whether to impose any categorical limitation in place of the no-extrinsic-evidence rule. The majority favored admitting relevant extrinsic evidence "except for direct evidence of the testator's dispositive intention," *id.* 17 (emphasis in original), while the minority supported un-

the will from expressing an intent that the testator formed and communicated, and which a well-proven reformation case can correct.²²³

3. Burden of Proof: Questions of Putative Intent

The typical reformation case, such as clerical error, involves a mistake in the rendering of terms that the testator has authored or approved. The remedy in such a case has exactly the dimensions

restricted admissibility of extrinsic evidence. The majority thought that "the evidence should be admissible for the purpose of establishing (e.g.) the special meaning to the testator of words used in the will or the surrounding circumstances, but not for the purpose of affecting the construction of the will by establishing what was the testator's dispositive intention." *Id.* 19. The minority replied that "[t]here is a certain artificiality in trying to distinguish between the words which the testator intended to use and the meaning which he intended them to have." *Id.* 20. The three recent American cases neatly illustrate why the majority's exclusion is both unworkable and undesirable. In *Taff* and *Engle v. Siegel*, where the courts felt themselves still prevented by the no-reformation rule from expressly seeking what the English committee calls the "testator's dispositive intentions," they pretended to construe the wills in order to achieve that result covertly. They identified Pearl Taff's "special meaning" of the term "heirs," and Albert and Judith Siegel's "special meaning" of the term "Rose Siegel." By contrast, in *Snide* where the mistake respecting the "testator's dispositive intentions" was most strongly proved, the "mere construction" ruse would have been hardest to use and the English committee's majority rule would have denied relief. We see, therefore, that in the recent American cases the committee's suggested exclusion would have produced both dishonesty and unpredictability when evaded, and injustice when not.

²²³ One recurrent situation in which the availability of reformation for mistake of law should work an important improvement arises when bad draftsmanship would otherwise defeat a testator's intent to exercise a power of appointment. In the typical case the testator is the donee of a power of appointment, which he wishes to exercise by will in favor of his residuary legatees. His lawyer attempts to implement that intent by drafting a single provision (a so-called "blending clause") that both disposes of residue and exercises the power, for example: "All the rest, residue and remainder of my estate, including any property over which I have a power of appointment, I give, devise, and bequeath to . . ." After the testator's death the validity of the exercise is called into question because the will of the donor of the power contained a requirement that the power could only be exercised by making "specific reference" to it. Among recent cases in which the court, despite a finding that the testator intended to exercise the power in question, held that the power was not exercised because the blending clause drafted by his lawyer did not contain a sufficiently specific reference to the power to meet the specific reference requirement established by the donor's will: *In re Estate of Smith*, 41 Colo. App. 366, 585 P.2d 319 (1978); *First Nat'l Bank v. Walker*, 607 S.W.2d 469 (Tenn. 1980); *Holzbach v. United Virginia Bank*, 216 Va. 482, 219 S.E.2d 868 (1975); see also *Schede Estate*, 426 Pa. 93, 231 A.2d 135 (1967). Cases reaching the opposite conclusion (that the power was validly exercised) on similar facts are *McKelvey v. Terry*, 370 Mass. 328, 346 N.E.2d 912 (1976); *Estate of Eddy*, 123 Cal. App. 3d 380, 176 Cal. Rptr. 598 (1981); *Cross v. Cross*, 559 S.W.2d 196 (Mo. App. 1977); *In re Estate of Berard*, 89 Misc. 2d 838, 393 N.Y.S.2d 149 (1977); *First Union Nat'l Bank v. Moss*, 32 N.C. App. 499, 233 S.E.2d 88 (1977). Under the reformation doctrine it would not be necessary to construe the blending clause as specific reference in order to avoid frustrating the testator's intent, since the instrument could be reformed to make his intent explicit.

of the mistake. The term that the testator intended is restored. Most mistake cases will exhibit this easy correspondence of mistake and remedy, whereby clear-and-convincing proof of the mistake will simultaneously provide precise guidance on the scope of the remedy.

Occasionally, however, the situation can be more complex, as we may show by recurring to cases such as *Estate of Mittleman v. Commissioner*,²²⁴ previously discussed,²²⁵ where a mistake of tax planning comes about through the failure of the testator's lawyer to achieve a tax objective that the testator wanted, and that the lawyer assured him had been achieved. In *Mittleman* there was powerful evidence that the testator intended to qualify for the marital deduction, but no evidence that he had formed the requisite intent to grant his widow the right to all the income from the trust. On account of the lawyer's mistake, the testator was not advised that he had to grant his widow the entire income interest in order to qualify for the deduction. Accordingly, although the testator formed an actual intent to qualify for the deduction, he never knew the cost of doing so, and he never formed an actual intent to take the essential step of granting the income to his widow. If he had been competently advised, he would have had the opportunity of deciding whether to forego the deduction and restrict his wife's entitlement in the income of the trust as he did, or gain the deduction and forego the restriction. If *Mittleman* had been brought as a reformation case, rather than as a construction case in which the problem was submerged, the court would have been bound to notice that the requested reformation would deprive the persons otherwise entitled to accumulated income, even though the testator had not formed a particularized intention to that effect. The specter looms of the reformation doctrine leading the courts into just that quagmire that the Wills Act has been designed to fence off, claims based on putative intent ("if only my aunt had known how much I loved her, she'd have left me more").

Fortunately, there are intrinsic and sensible limits to the scope of remedy in a case that involves such a component of putative intent. The burden-of-proof requirement as it should be applied in a case like *Mittleman* would result in a double layer of safeguard. The testator's actual intent, here his instruction to obtain the deduction, would have to be proved by the familiar clear-and-convincing

²²⁴ 522 F.2d 132 (D.C. Cir. 1975). See also *supra* note 104 (perpetuity reformation).

²²⁵ See *supra* text accompanying notes 112-23.

evidence. Further, the testator's putative intent would also have to be proved to the standard of clear-and-convincing likelihood. The facts in *Mittleman*, which permit no serious doubt about which course the testator would have followed, would easily satisfy that test. The size of the trust was such that there was unlikely to be very much if any excess income,²²⁶ and even if there were the widow was given a general testamentary power over it. Depriving other potential takers of the right to accumulated income would have been virtually costless, because it was so unlikely that there would be any accumulated income for them to take.

Many other equally clear cases can be imagined. Estate tax deductions can be lost because of a lawyer's inclusion of boilerplate but nevertheless disqualifying provisions such as a spendthrift provision of the forfeiture type attached to the surviving spouse's income interest.²²⁷ Such provisions are so trivial that their inclusion would seldom even be brought to the testator's attention by his lawyer; they are not, in other words, the product of the testator's particularized instruction to the lawyer. By the same token, the omission from a charitable remainder annuity trust or unitrust of trivial provisions such as a power in the trustee to name a qualified charitable organization as the remainderman if the charity designated in the trust instrument is no longer a qualified charitable organization at the time that the remainder is to become possessory disqualifies the remainder interest for the charitable deduction.²²⁸

²²⁶ 522 F.2d at 139.

²²⁷ See *Virginia Nat'l Bank v. United States*, 443 F.2d 1030 (4th Cir. 1971), in which the court was able to save the marital deduction for the decedent's estate by "construing" the will in such a way that the forfeiture restraint applied to the non-marital trust (Trust B), but not to the marital deduction trust (Trust A). In making this construction, the court relied on extrinsic evidence, the principal ingredient of which was that both the decedent's attorney and the trust officer advised the decedent prior to the will's execution that Trust A would qualify for the marital deduction. Since the case was handled as a construction matter, the extrinsic evidence was only admissible if the will contained an ambiguity. The court identified as an ambiguity a feature of the will that was not ambiguous, and surprisingly overlooked a true ambiguity. The nonambiguity that the court nevertheless identified as one was that the clause containing the forfeiture restraint was prefaced with the phrase "Notwithstanding anything herein to the contrary"; this, the court thought, made it inconsistent with the provisions of Trust A that granted the surviving spouse unrestricted rights! The true ambiguity, not noticed by the court, was that the forfeiture restraint expressly applied to "the trust created by this will"; since the will created two trusts, not one, it was ambiguous to which trust the restraint was intended to apply.

²²⁸ Rev. Rul. 72-395, 1972-2 C.B. 340, and Rev. Rul. 80-123, 1980-1 C.B. 205, set forth mandatory provisions—including the one mentioned in the text above—the omission of any one of which, the Commissioner ruled, disqualifies a charitable remainder annuity trust or unitrust for the charitable deduction. (In a pending case,

In any of these cases, there can be no serious doubt what the testator's decision would have been had he had the opportunity to decide.

The instances of putative intent that will be remediable under the reformation doctrine are not free standing, as would be that ominous claim that must never be opened to litigation, "If my aunt had known how much I loved her, she'd have left me more." On account of the particularity and burden-of-proof requirements that characterize the reformation doctrine, remediable instances of putative intent will be ancillary to well-proven cases of actual intent, and therefore greatly restricted in scope.

C. *The Well-Drafted Will*

Testation is a field in which planning values are quite rightly viewed as paramount. Since the will comes into effect when the testator is powerless to change it, certainty and predictability are at least as important here as in any field of law. If the development of a mistake doctrine were to jeopardize well-drafted instruments, the gain would surely not be worth the cost. Would a reformation doctrine open every estate to the depredation of potential contestants claiming to take under a mistakenly rendered or mistakenly omitted term? There are many reasons for thinking not. To begin with, as the recent cases discussed in part III illustrate, the real sphere for relief against mistake has been in cases of deficient lawyering. The *Taff* case could not have arisen if counsel had worded the will to speak of "my natural heirs." In *Engle v. Siegel*, routine good drafting would have provided a further disposition for the contingency that one of the testators' mothers predeceased them. In *Snide*, all that the lawyer had to do in order to prevent the mistake was to read the first line of the document that he gave his client to execute.

The existence of relief in these cases will not work as a magnet for groundless claims against well-drafted wills. Existing reformation practice in contract and conveyancing has disclosed no such problem,²²⁹ and the reason seems obvious. The clear-and-convincing-evidence standard would impose too onerous a burden of proof upon the proponent of a spurious claim. Indeed, we have argued

one of the authors of this Article assisted the lawyers representing the estate of a decedent whose will omitted several such mandatory provisions. The estate is now seeking reformation of the will with the consent of all parties in interest for the purpose of qualifying the trust for the charitable deduction pursuant to I.R.C. § 2055(e)(3) (Supp. III 1979).)

²²⁹ See *supra* notes 9-25 & 173-83 and accompanying text.

that the recognition of a reformation doctrine would serve to increase the level of safeguard in cases like *Taff* and *Engle v. Siegel* that have been decided as "mere construction" cases without attention to the clear-and-convincing-evidence standard. So long as there is no effective way to suppress this "mere construction" ruse, it is far better to operate an honest reformation doctrine that relieves the pressure for subterfuge and sets an appropriate test for relief.

The concern is sometimes voiced that in jurisdictions that permit will contests to be tried by jury,²³⁰ a sympathetic contestant with a trumped-up mistake claim might be able to procure a verdict reflecting rather more sympathy than mistake. The prospect of such an outcome might lend a settlement value that the claim would otherwise lack. Since, however, both the cause of action for mistake and the reformation remedy are classical heads of equity jurisdiction, the right to jury trial ought not in general to attach. Further, where a state does treat such claims as juryable, the clear-and-convincing-evidence standard would raise the threshold for directed verdict and summary judgment to a level that would deter the litigation, as seems to be the situation in the field of nonprobate transfers where strike-suit type mistake claims have had no currency.

Finally, we should emphasize that just as the reformation doctrine will have negligible effect upon well-drafted instruments, it will not encourage draftsmen to become slovenly. Precisely because the reformation doctrine is a rule of litigation, no draftsman would plan to rely on it when proper drafting can spare the expense and hazard of litigation. Every incentive to good drafting would remain.

D. *Scrivener's Testimony*²³¹

A special characteristic of the proofs in the typical mistake case is that the testimony of the scrivener who made the mistake is frequently the predominant piece of evidence. On first impression this is a disturbing factor. We can imagine a duplicitous draftsman conniving with an interested contestant after the testator's death and testifying to a supposed mistake of which the draftsman has sole knowledge.

Reflection will show why this danger is remote, and why it has not figured in those areas of the law where analogous mistakes have been remedied—the "mere construction" cases in testation, and the

²³⁰ Annot., 33 A.L.R.2d 1145 (1954).

²³¹ See generally Annot., 90 A.L.R.2d 924 (1963).

reformation cases in contract and conveyance that involve instruments uttered by persons now deceased. The starting point is to understand that a lawyer-draftsman has strong disincentives to plead his own slovenliness: It is not exactly a business-getter, it is costly in professional esteem, it may give rise to malpractice liability, and in extreme cases it can lead to professional discipline. Normally, therefore, the opposite danger is the serious one—that the lawyer will conceal his blunder.

The lawyer is most likely to admit his mistake when there is other evidence of it, such as Pearl Taff's letter to her sister describing her understanding of the purport of her will; or when the mistake is manifest, as in the mistaken execution cases like *Snide*. In *Engle v. Siegel*, where the lawyer's testimony was not directly corroborated as in *Taff*, and where the mistake was not as obvious as in *Snide*, the court took care to identify factors that lent credence to the lawyer's account—the unnaturalness of excluding Albert Siegel's heirs in the context of tranquil family circumstances, as well as Albert's having generated the wealth that was passing under the two estates.

Accordingly, we are not surprised that the California and New Jersey reports since *Taff* and *Engle v. Siegel* do not disclose any cases in which there is the least allegation or suspicion of complicity between a scheming lawyer and a disappointed survivor. The burden of proof is too high for the lawyer to carry unaided in most cases. The lawyer would always fear detection if he attempted to participate in the spoils from his perjury, and detection would result in disbarment and criminal liability. Here, then, is a set of floodgates that may be left comfortably ajar without consequence.

E. Malpractice Liability

Because the error in many mistake cases is sufficiently egregious that a victim might be able to invoke the malpractice liability of the lawyer-draftsman if relief for mistake were denied,²³² the argument can be made that the malpractice remedy makes relief for mistake unnecessary. The intended beneficiary whose devise has been frustrated by the lawyer's mistake can be remitted to his malpractice remedy against the offending draftsman.²³³ We think that there are a variety of responses to this contention.

²³² See Annot., 45 A.L.R.3d 1181, 1195-200 (1972).

²³³ It can be argued that this was the implicit rationale in *Heyer v. Flaig*, 70 Cal. 2d 223, 444 P.2d 161, 74 Cal. Rptr. 225 (1969).

Initially, we note that there is a range of mistake cases that fall outside the scope of malpractice relief, including homedrawn wills and those lawyer-drafted wills where for whatever reason the mistake does not rise to the level of malpractice. Furthermore, in a considerable fraction of lawyer malpractice cases, the draftsman may be wholly or partially judgment-proof, as when he is long since deceased,²³⁴ or when he is uninsured or underinsured. In one region of the country for which a specialist insurance broker has supplied recent data on malpractice coverage to the American Bar Association's Standing Committee on Lawyers' Professional Liability, 51% of the policies in force have \$100,000/\$300,000 limits, well below the value of significant numbers of testate estates.²³⁵ For devises of unique property, for example, Blackacre or the family bible, relief in damages would not be an adequate substitute.

The malpractice solution is also objectionable because it would channel mistake cases into the tort system. When translated into a tort claim and discounted for the litigation expenses and counsel fees, and for the unpredictability and delay incident to the jury-dominated tort system, a devise frustrated by mistake would be worth but a fraction of the value in the testator's estate.

More fundamentally, the change in theory from devise to tort raises a serious problem of unjust enrichment. Whereas most forms of malpractice inflict deadweight loss that can only be put right by compensation, in these testamentary mistake cases a benefit is being transferred from the intended beneficiary to a mistaken devisee. That devisee is a volunteer lacking any claim of entitlement or justified reliance. The malpractice solution would leave the benefit where it fortuitously fell, thereby creating a needless loss to be charged against the draftsman (or his insurer). So long as the draftsman's error was innocent (which is what distinguishes mistake from fraud), there is no reason to exaggerate his liability in this way. If, on the other hand, the lawyer were charged with the malpractice but subrogated to the tort plaintiff's mistake claim, the mistake doctrine would simply be recognized in a circular and more litigious fashion.

We do not mean to say that negligent draftsmen will be immune from malpractice liability in testamentary mistake cases. When the malpractice causes true loss, that loss should be com-

²³⁴ A malpractice claim against an attorney may survive the attorney's death. *McStowe v. Borenstein*, 377 Mass. 804, 388 N.E.2d 674 (1979).

²³⁵ Interview with John Pompelli, Staff Director, ABA Standing Committee on Lawyers' Professional Liability (July 16, 1980).

pensable. One such item of compensable loss may be the reasonable litigation expenses of the parties to the reformation (or other) proceeding occasioned by the mistake. We can also imagine circumstances in which a mistake might come to light after distribution and dissipation of the mistakenly devised property; here the change of position of the mistaken devisee would constitute justified reliance and require that the intended beneficiary be remitted to his malpractice remedy.

Finally, we point once more to the experience under the many existing doctrines that provide partial relief in the field of testamentary mistake. There has been no suggestion in the "mere construction" and other cases discussed in parts II and III that malpractice should be regarded as an alternative to direct relief.

VI. CONCLUSION

So long as it is human to err, instances of mistaken terms in wills are inevitable. The impulse to remedy these errors in order to prevent unjust enrichment is also deeply rooted in our sense of justice, which is why the simplistic rule forbidding relief against mistake is dissolving. With the barriers to the receipt of extrinsic evidence coming down, and with theories now developed for overcoming the unattested language problem, courts will be presented with mistake cases ever more persistently. To be sure, business as usual can continue. The courts can go on manipulating supposed rules of construction, and they can make more exceptions. We think that a principled reformation doctrine has all the advantages over the patchwork of inconsistency and injustice that characterize the present law. The purposes of the discredited no-reformation rule will be better served under an explicit reformation doctrine that puts mistake cases to the test of an appropriate standard of proof.